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CONTESTING CONSTITUTIONAL MEANING: THE POLITICAL CONSTITUTION AND THE MYTH OF JUDICIAL SUPREMACY

A Dissertation Presented

by

GEORGE THOMAS

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DEDICATION

For Courtney

Remember Venice in the rain?

ACKNOWLEDGMENTS

I should begin by thanking Jeff Sedgwick and Jerry Mileur, who went out of their way to bring me to Amherst. Jerry, as is his wont, would never take credit for it—if, in fact, he even wants such a lofty responsibility—but I would like to properly thank him for going out of his way to make my stay in Amherst a happy one. I would also like to thank him for giving me a true education in politics (of all things!) and a deep understanding of the relationship between political parties and American political thought. Much of my understanding of American institutions and thought comes from Jeff; indeed, in many ways, his thinking is at the root of this dissertation. He has always been very generous with his time and fostered a collegial environment for graduate students—more than just a mentor, I count Jeff as a lifelong friend.

Craig W. Thomas forced me to rethink the structure of my argument at a crucial stage, which helped me reorganize the dissertation. His help was invaluable, although I absolve him of all responsibility for the finished product (as I can guess just where he would force me to be more rigorous in my research design and methodology). Craig also happens to have the same name—even the middle initial—as my brother, who I'd like to thank here as well. Though I should note that his only contribution—besides being a best friend and entertaining me while I wasn't working, as well as blessing me with two beautiful nieces—was to note that the writing and argument were "dense" and occasionally ask if I was done with it yet.

For helpful comments along the way, I'd also like to thank Mark Graber, Keith Whittington, and especially John Brigham, who reminded me to keep my audience in mind. I'd also like to thank Milton Cantor, who agreed to be my outside reader. The Supreme Court Historical Society, and particularly Mel Urofsky, gave me the opportunity to present an early sketch of this project, where I received particularly good advice from Dick Pious—"ok, but don't *just* engage in theory"—that helped me find the blend of the theoretical and historical that animates this dissertation. Bob Lacey, usually over a pint, frequently indulged my late-night theorizing with good cheer and, on occasion, heated responses that testify to the true nature of friendship.

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thinking I was often brought back to a question Shelly had subtly planted and, I take it, trusted I'd eventually stumble upon myself. I hope what follows at least partly repays their confidence in me.

My greatest debt is to my family. Courtney Johnson has heard the arguments that follow for far too long and, often, with me starting apropos of nothing, leaving her to sort it out, as she so often does. And while I was often impatient, agitated, or simply tired of it, she was steady, calming, and restorative. She's my best editor in life as well as in writing. Angelo Joseph Thomas reminds me, in his wonderfully articulate way, that constitutional theory palls in comparison to sticks, screwdrivers, hammers, and all else that he touches. Finally, I cannot begin to thank my parents for all they have done over the years. Truly, words fail me. ("That's a first," I can hear them say.) I would never have been a scholar without them, as they always insisted that I do what I love. But, far more, I would never be who I am without them.

ABSTRACT

CONTESTING CONSTITUTIONAL MEANING:
THE POLITICAL CONSTITUTION AND THE MYTH OF JUDICIAL SUPREMACY

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In the last decade a lively debate about "extrajudicial" constitutional interpretation has broken out among constitutional scholars. And while this debate has insisted upon the centrality of nonjudicial constitutional interpretation, this scholarship remains rooted in "legal" views of the Constitution, which continue to give primacy of place to the Court. This dissertation seeks to go further by articulating a political view of the Constitution, which will allow us to resituate how we think of the Constitution and place questions of interpretation within this larger framework. This political view suggests that the constitution calls forth continual debate about constitutional meaning, that the "settlement" of constitutional issues is not an essential feature of our constitutional system and, thus, that constitutional politics with overlapping views, discontinuities, and essentially unsettled meaning are an inherent feature of our Constitution. Recovering the political Constitution is an essential step in rethinking what the Constitution is and, in doing so, overcoming the deeply ingrained myth of judicial supremacy.

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"Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea."

James Madison

INTRODUCTION:
CONSTITUTIONAL POLITICS AND JUDICIAL SUPREMACY

If recent events are any indication, there is a deep skepticism that legislative bodies are capable of addressing the Constitution in a high-minded way. In fact, the one thing that links the two most stunning constitutional events in recent memory—the impeachment of a president for only the second time in our history and the Supreme Court's opinion effectively deciding a presidential election for the first time in our history—is a deep suspicion that the Congress is not capable of settling serious constitutional questions. During the House's impeachment of President Clinton, legal scholars offered to guide the House in defining what constitutes an impeachable offense, quite sure that the House itself was not capable of speaking to this delicate constitutional question. And this was asserted despite the fact that the Constitution clearly vests this very power in the House, our most democratic national institution, not with lawyers or courts.

In a similar vein, many of those who praise the Supreme Court's opinion in *Bush v. Gore* do so on the grounds that it averted a constitutional crisis. That the Congress would have to determine a presidential election, potentially choosing between two slates of electors, and, thus, weigh in on serious constitutional issues, was seen as the root of the constitutional crisis. According to one of our most preeminent jurists, and one who frequently calls for rigorous empirical analysis, this itself was cause for alarm: "We only know what *could*

have ensued—and what could have ensued is fairly described as chaos."[1] Yet Judge Posner bases his argument on speculation, not empirical evidence. And he does this despite the fact that the Constitution vests the Congress with this very power. We are so distrustful of the legislature's ability to reason about the Constitution that the mere thought of it taking up such questions is reason to worry; indeed, to precipitate a constitutional crisis. Even those who criticized the Court's opinion in *Bush v. Gore* shared this skepticism. While they decried the Supreme Court's opinion, they were just as worried that the Florida state legislature might attempt to weigh in on the issue. Most preferred to let the Florida Supreme Court's opinion stand—they preferred the voice of a court to the voice of the legislature.[2] Again, this is odd, because the Constitution itself quite clearly gives this power to legislative bodies and not to courts. We are reluctant to let the political branches speak to constitutional questions. We seem to doubt, even, their capability to do so. But is such doubt warranted?

The Supreme Court itself echoes such thinking. In speaking of Congress' power under section 5 of the 14th Amendment, which plainly says that Congress has the power to enforce the terms of the amendment, the Court has said that

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[1] Richard Posner, *Democracy's Deadlock: Breaking the 2000 Election* (Princeton, Princeton University Press, 2001). For a critique of this view, see Howard Gillman, *The Votes That Counted: How the Court Decided the 2000 Presidential Election* (Chicago: University of Chicago Press, 2001). As Gillman argues, [F]orcing politicians to work through a presidential selection process without the roadmap of a crystal clear legal process is not a crisis; it is democracy, and it has all the disadvantages and advantages of democratic politics," 195. For a defense of *Bush v. Gore,* and especially a criticism of the legal academy's bias, see Peter Berkowitz and Benjamin Wittes, "The Lawfulness of the Election Decision: A Reply to Professor Tribe" *Villanova Law Review* (forthcoming) and Berkowitz, "The Professors and *Bush v. Gore*" *Wilson Quarterly* Autumn 2001.

[2] Jed Rubenfeld, "Not as Bad as *Plessy*, Worse" and Laurence Tribe, "eroG v. hsuB: Through the Looking Glass" both in Bruce Ackerman, ed., Bush v. Gore*: The Question of Legitimacy* (New Haven: Yale University Press, 2002).

Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].'"[3] The meaning of these provisions is to be determined by the Court. The legislature cannot be trusted with such vexing questions of constitutional meaning and is thereby obligated to follow the Court's interpretation. While such claims to judicial supremacy resonate strongly with the public, scholars, and even members of the so-called political branches themselves, there is growing criticism of the Court's own insistence upon judicial supremacy. Scholars on both the left and the right have sought to "take the Constitution away from the Court" in the name of democratic government. Still, such critics tend to view the Constitution in largely legal terms, and it is this, this dissertation argues, that lends credence to claims of judicial supremacy and skepticism that the political branches may meaningfully speak to the Constitution.

By beginning from the premise that the Constitution is law, the proponents of judicial supremacy suggest that the very nature of constitutional government requires the Court to act as the supreme and exclusive arbiter of constitutional meaning. Indeed, as I argue, the legalist view of the Constitution is the crux of judicial supremacy.[4] If we are under a constitution, so much of conventional

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[3] *City of Boerne v. Flores,* 521 U.S. 507, 529 (1997). See especially, *Cooper v. Aaron*, 358 U.S. 1 (1958).

[4] Keith Whittington suggests that there are three fundamental objections to extrajudicial constitutional interpretation, 1. It's anarchic. 2. It's irrational. 3. It's tyrannical. While I want to take up these objections in my discussion of judicial supremacy, I suggest that they all have their roots in the view of the Constitution as law akin to ordinary law. Whittington, "Extrajudicial Constitutional Interpretation--Three Objections and a Response" *University of North Carolina Law Review* 80: 3 (2002).

wisdom goes, the Constitution must be rigorously and authoritatively enforced by the judiciary, particularly the Supreme Court.[5] This means not only that the Court is the exclusive interpreter of constitutional meaning, but that its interpretations are authoritatively binding on the other branches of government.[6] If the political branches are free to disregard judicial interpretations of the Constitution, and thereby continually dispute constitutional meaning, then we cannot be authoritatively bound by the Constitution as law.[7] It is useful, here, to distinguish between two forms of judicial supremacy. The strong form of judicial supremacy suggests that the judiciary is the exclusive interpreter as well as the authoritative interpreter of constitutional meaning (exclusive, after all, implies authoritative).[8] A modified version of judicial supremacy suggests that the Supreme Court is not the exclusive interpreter of the Constitution, but that its interpretations are final.[9] Constitutional interpretation may well include the Congress, the President, and the people, but once the Court hands down a decision, its interpretation is taken to be

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[5] Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation" *Harvard Law Review* 110:7: 1359-1387 (1997).

[6] Scott Gant qualifies the notion of judicial supremacy by suggesting that the judiciary is not the exclusive interpreter of the Constitution, but that its interpretations are, once given, authoritative—at least in the short run. Gant, "Judicial Supremacy and Nonjudicial Interpretation of the Constitution" *Hastings Constitutional Law Quarterly* 24:359-440 (1997). For a general discussion, see also Bruce Peabody, "Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research" *Constitutional Commentary* 16: 63-90 (1999).

[7] Alexander and Schauer, "On Extrajudicial Constitutional Interpretation," 1381.

[8] See Alexander and Schauer, "Extrajudicial Constitutional Interpretation."

[9] There is a growing literature by both conservatives and liberals increasingly critical of judicial supremacy—calling it, even, the judicial usurpation of politics. Michael Perry, *We the People: The Fourteenth Amendment and the Supreme Court* (New York: Oxford University Press, 1999), 3-14; Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999), 6-32; Cass Sunstein, *One Case at a Time: Judicial Minimalism and the Supreme Court* (Cambridge: Harvard University Press, 1998); Scott Douglas Gerber, "The Judicial Brezhnev Doctrine" *Harvard Journal of Law and Public Policy* (2000). "The End of Democracy?" *First Things* November 1996, especially Robert Bork's "Our Judicial Oligarchy" and Robert George's "The Tyrant State."

authoritative, thereby binding the Congress, the President, and the people to its reading of the Constitution.[10] On both normative and empirical grounds, the distinction between a strong form of judicial supremacy and a modified version is important, but it is not central to the question I wish to raise. Whether judicial interpretation is held to be exclusive or merely final, each view insists that authoritative *judicial* settlement is necessary to constitutional governance.

Even with the turn to history in legal scholarship, much of constitutional theory remains rooted in theoretical and normative issues, with little attention to the historical functioning of our constitutional system. Reading the leading defenders of judicial supremacy, for example, one is struck by the fact that they argue for judicial settlement in a way that altogether skirts empirical questions: they insist that nonjudicial constitutional interpretation will lead to chaos, bringing into doubt the very notion of the Constitution as law. But nowhere do they bother to show this.[11] Thus many of their concerns about nonjudicial constitutional interpretation seem to be rooted in their *theory* of constitutionalism and not in actual problems of constitutional governance. Modified versions of judicial supremacy are far more accurate descriptively, as they concede that, like it or not, the Congress and the President have, on occasion, engaged in constitutional interpretation, but such thinking still insists on authoritative

[10] For this view see Scott Gant, "Judicial Supremacy and Nonjudicial Interpretation of the Constitution" and James Fleming, "The Constitution Outside the Courts" *Cornell Law Review* 86:167: 215-249, 221 (review of Tushnet's *Taking the Constitution Away from the Courts*), Sotirios Barber and James Fleming, "The Canon and the Constitution Outside The Court" *Constitutional Commentary* 17: 267-273 (2000).

[11] Larry Alexander and Fredrick Schauer, "On Extrajudicial Constitutional Interpretation."

settlement by the judiciary.[12] Yet this very notion seems suspect on both conceptual and empirical grounds.

Judicial supremacy operates as a sort of constitutional myth: its logic and presuppositions are offered up to us, but find little grounding in our actual constitutional history. The myth, though, is powerful. Our preoccupation with it leads us to slight the role that the political branches play in maintaining our constitutional system and important constitutional developments that exist outside the courts.[13] A role that in many instances is called forth by the very text of the Constitution itself. And the myth is made even more powerful as constitutional theory so often focuses on a perfectly imagined judiciary, measuring it according to the "ought" of theory, like a platonic form in an imagined polity. Against this, the political branches are seen in real-world terms, usually in their worst light, eager to trample on the Constitution. So much of constitutional theory itself often operates in the land of mythology and not political science; it is perhaps not a coincidence that one of the most famous defenders of judicial supremacy calls his imaginary judge Hercules.[14]

As constitutionalism has come to be seen as primarily about legal limitations on government by way of legal text, the judiciary is seen as "the one

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[12] Scott Gant qualifies his version of judicial supremacy saying that, well, nothing is final. If that is so, then why do we really need authoritative judicial settlement? If constitutional questions can be reopened by the other branches or by the public, then why close them by the judiciary?

[13] Stephen Griffin, *American Constitutionalism: From Theory to Politics* (Princeton: Princeton University Press, 1996) and Wayne Moore, *Constitutional Rights and Powers of the People* (Princeton: Princeton University Press, 1996). See also Bruce Ackerman, *We the People: Transformations* (Cambridge: Harvard University Press, 1998) suggesting that constitutional politics are "extraordinary" and "transformative" events.

[14] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1987).

institution above all others essential to the preservation of the law."[15] If the Constitution is a sort of "higher law," it is only in thinking of this law as akin to "a statute emanating from the sovereign people" and coupling that with judicial review that it is maintained.[16] Yet this view collapses the "what of the Constitution" into the "who of interpretation."[17] If we insist that the Constitution is law, we may then posit that the judiciary must interpret the law and must interpret it according to legal conventions. Such a view, though, conflates "constitutional fundamentality" with judicial supremacy.[18] Against this view, this dissertation seeks to establish a more overtly political view of the Constitution, drawing on public law scholarship that has begun unpacking the easy merger of the Constitution-as-law (what is the Constitution?) with the judiciary-as-interpreter-of-law (who interprets the Constitution?). If the legal Constitution takes its bearings from John Marshall, the political Constitution might be seen as James Madison's Constitution. From this view, the Constitution is not just legal text, but the very framework of government that the text calls to life. The political Constitution is maintained by political devices and not by the fact that it is "law," what Madison called a mere "parchment barrier." Accordingly, the Constitution is structured in such a way as to maintain constitutional limits (although this is

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[15] Charles McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1947) 140.

[16] Edward Corwin, *The "Higher Law" Background of American Constitutional Law* (Ithaca: Cornell University Press, 1955) 89.

[17] I am following the interrogatives set forth by Walter Murphy, Sotirios Barber, and James Fleming, *American Constitutional Interpretation* (New York: Foundation Press, 1995). By asking WHAT is the Constitution? WHO may interpret it? And HOW is it to be interpreted? Murphy et al sort out these concepts that are often merged together.

[18] William Harris, *The Interpretable Constitution* (Baltimore: Johns Hopkins University Press, 1993) 20-24.

only part of the picture) by this very framework, relying on the political process itself and the interaction between these branches of government over constitutional meaning. As the Constitution is our fundamental charter, maintaining it is a political task for all the branches, not simply a legal task for the Court.

At least such has been a crucial recognition in the last decade, as scholars have turned their attention to the importance of constitutional politics.[19] The most significant development in constitutional theory in recent years may well be this shift in focus from the relationship between "law and morality" to the relationship between "law and politics." Perhaps nowhere is this more evident than in Bruce Ackerman's two volume *We the People*, which rejects standard narratives of constitutional evolution in favor of great moments of constitutional conflict and transformation. Ackerman, among others, offers a regimes analysis of American constitutional development.[20] He argues that in extraordinary moments of constitutional politics, we (as a people) reforge our constitutional understandings and create "new" constitutional regimes. For Ackerman, there have been three constitutional regimes—the Founding, Civil War, and New Deal—not one. In this telling of our constitutional history, the political branches and the people are primarily responsible for transforming constitutional meaning in these unique constitutional moments, usually against the Court, which, properly, adheres to the

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[19] See Mark Graber, "Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship" (Review of Lucas A. Powe, Jr., *The Warren Court in American Politics*) *Law and Social Inquiry* 27: 309 (2002).

[20] Bruce Ackerman, *We the People: Foundations* (volume 1) and *Transformations* (volume 2) (Cambridge: Harvard University Press, 1991 and 1998).

older understanding of the Constitution and thereby provokes debate about the very nature of constitutional government. The people, then, in a genuine act of popular sovereignty, ratify new constitutional understandings giving us a new constitutional regime. Yet, even for Ackerman, such moments of constitutional politics are rare—moments of punctuated dispute that disrupt our otherwise placid constitutionalism. During times of ordinary politics, the Court properly takes up the primary responsibility of enforcing and defending the Constitution. In a similar vein, Keith Whittington has advanced a view of constitutional regimes that are attached to "reconstructive presidents," presidents that reconstitute our fundamental constitutional commitments and thereby alter how we think about the Constitution.[21] Such presidents are "departmentalists" who argue against the "Old Court"—the defender of the inherited regime—and recreate the political order and our constitutional commitments. But here, too, a reconstituted Court takes primary responsibility for defending and articulating these new constitutional understandings. The common theme of a regimes narrative of our constitutional history is that "political" interpretation is, by and large, an extraordinary moment of constitutional politics, after which we return to a more ordinary politics—where the Court, once more, becomes central.[22] There is a good deal of truth to

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[21] "The Political Foundations of Judicial Supremacy" in Sotirios Barber and Robert P. George, eds, *Constitutional Politics: Essays on Constitutional Making, Maintenance, and Change* (Princeton: Princeton University Press, 2001) and "Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning," *Polity* Volume XXXIII, Number 3 (2001). Whittington's work focus on the political construction of judicial power and is thus more open to regimes being fluid.

[22] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993) and Akhil Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998) also offer a sort of regimes analysis of constitutional development, revealing how our essential constitutional commitments have been radically altered.

this, especially the recognition of punctuated moments of constitutional change, but it misses the way significant constitutional change can come incrementally, absent extraordinary transformation, or clear-cut political realignment, as well as the way in which constitutional meaning may remain in a state of unsettlement. A regimes understanding of constitutional development is a definite improvement on "progressive" views, which too frequently sees constitutional change as an easy forward movement that has gradually recognized the promise of the "living" Constitution—usually, so such narratives go, by way of Court opinions. Some claims to judicial supremacy have even been founded in such facile views of constitutional "development."[23] Indeed, the very language of "development" is freighted, insinuating a sort of constitutional evolution that moves in a linear manner, always to something higher.[24] Yet, a constitutional regimes approach is inadequate insofar as it treats constitutional politics as discrete and unusual moments after which we return to the norm of constitutional settlement and continuity. Such a packaging of our constitutional history masks persistent constitutional conflict and disputes over constitutional meaning that are a recurrent feature of our constitutionalism—a feature, I argue, that is called forth by our very constitutional framework. A central claim of my dissertation is that

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[23] William Brennan, Jr. "The Constitution of the United States: Contemporary Ratification" Lecture delivered at Georgetown University, Oct. 12, 1985.

[24] See, for such "aspirational" theories of constitutional interpretation, Sotirios Barber, *On What the Constitution Means* (Baltimore: Johns Hopkins University Press, 1984) and "Notes on Constitutional Maintenance" in Barber and George, eds., *Constitutional Politics*; Michael Perry, *We the People: The Fourteenth Amendment and the Supreme Court* (New York: Oxford University Press, 1999). Though, the Rehnquist Court has surely given pause to such theorizing, which took much of its inspiration from the Warren Court. One gets the feeling from leading constitutional thinkers like Mark Tushnet, who wants to "take the constitution away from the courts," and Cass Sunstein, who would like to see the Court go "one case at a time," that there new found skepticism of the Court stems from their political inclinations.

constitutional discontinuity and unsettlement are crucial to a full understanding of American constitutional development.[25]

The argument of my dissertation unfolds in two steps and the approach might be aptly described as a sort of "constitutional theory as political science." First, I argue that the preoccupations of judicial supremacy are rooted in a legal view of the Constitution—one that has itself been a part of political and institutional struggles in our history—and posits it as the only way to see the Constitution. Against this legal view of the Constitution, I argue that the Constitution is better understood in political terms. This conceptual unpacking of the legal Constitution (and its link to judicial supremacy) and a rearticulation of the political Constitution (unlinking judicial supremacy and constitutional maintenance) will clear the way for an empirical and historical analysis. The bulk of the dissertation examines the functioning of our institutions when contesting constitutional meaning, treating constitutional debate itself as an arena of political struggle. I examine four historical periods where constitutional meaning was contested between the political branches and the Court in a sustained fashion. Through the lens of these constitutional conflicts, we see the political constitution in action, illuminating how constitutional struggles were actually resolved between the branches of government when meaning *was contested* and illustrating how constitutional politics has been a central aspect of our constitutional development. Moreover, this historical and empirical examination will also allow

[25] Louis Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* (New Haven: Yale University Press, 2001) examines how judicial review may work to unsettle politics, but the argument on the whole is a normative justification for a particular view of the Court and judicial review.

me to examine the presuppositions of judicial supremacy: does the Court itself act in ways consistent with the requirements of authoritatively settling constitutional meaning?

Chapter 1 of my dissertation seeks to recover a political view of the Constitution in order to take on the central beginning point of judicial supremacy: as the Constitution is law, it must be enforced by the judiciary. But as Judge Gibson argued long ago, this is to reason from the very premise that is in dispute; that is, the Constitution must be treated as law because it is law.[26] If we see the Constitution not so much as a legal text but an institutional framework of governance, then the basis of judicial supremacy and the preoccupations that come along with it are not so clear. Given this, the first chapter is theoretical and conceptual, offering a Madisonian view of the Constitution. This will allow us to broaden our focus, letting us take on many of the presuppositions of judicial supremacy that are rooted in a legalist view of the Constitution and, from there, move us to examine the whole Constitution, going beyond the Court's-eye-view, to pay attention to institutional design, constitutional structure, and the political give and take between the branches of government.[27] In beginning with a Madisonian view of the Constitution, I want to show how constitutional structure was paramount to maintaining the Constitution itself. I suggest that in establishing this framework, we might try to place judicial review and questions of constitutional interpretation within this larger view. This will allow us to see that

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[26] *Eakin v. Raub*, 12 Sergeant & Rawle 330 (1825).

[27] Keith Whittington, "Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory" *University of Richmond Law Review* 34:509 (2000).

many of the preoccupations of judicial supremacy are rooted in a conceptual view of the Constitution and not necessarily in questions of actual constitutional governance. While I draw on theories of "interpretive plurality" like Walter Murphy's, I seek to connect those with larger questions of constitutional design.[28] In fact, I draw heavily on Murphy's conceptual separation of the "what of the constitution" from the "who of interpretation." If we see the Constitution in political terms, I suggest that we may situate the "who of interpretation" within the "what of the Constitution."[29] In this way, the Madisonian Constitution examines the dynamic interaction of the branches of government, so that we must understand them in relation to one another as part of an historical and political process. How each institution functions at a particular time is shaped by political, constitutional, and institutional struggles and thus is historically contingent. Whether the Court is the great protector of rights is not an abstract question of theory, but an historical question. And the answer, very likely, will vary across time. Similarly, presidents may be central to the development and articulation of constitutional meaning at one point in history and far less important at another. If constitutional development is a dynamic process, the claims of judicial supremacy or departmentalism will vary through our history and will very likely be the result of political struggles, which, in turn, shape how we think about the Constitution. This Madisonian view invites us to look at the actual practices of constitutional government to see how constitutional meaning is generated. This will be the task Chapters 2, 3, 4, and 5.

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[28] Walter Murphy, "Who Shall Interpret?" *Review of Politics* 48: 401 (1986).

A Madisonian understanding of the Constitution also illuminates parts of our constitutional history that are at odds with traditional narratives and understandings. By treating the Constitution as a political framework of governance, we can better recognize the Constitution for the imperfect document that it is: one that does not always give us an easy distinction between law and politics, one that does not always give us "right" answers to constitutional questions, and one that does not necessarily call for fundamental settlement of such questions. In fact, as a framework of governance the Constitution calls forth perpetual disagreement that asks us to reconcile competing values: an enterprise that countenances unsettlement and discontinuity, an enterprise that is itself open to the possibility of "failure."[30] The framework is established, true enough, to foster and protect American principles, but no framework of government can guarantee success—and, here, the Court cannot "save" us in this enterprise (as proponents of judicial supremacy often suggest). The Madisonian Constitution is, if I may play on the phrase, a "living constitution" that is argued over and altered,

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[29] Murphy, Barber, and Fleming, *American Constitutional Interpretation.*

[30] See especially Mark Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton: Princeton University Press, 1998). As Brandon notes, there is nothing inherently problematic about multiple constitutional perspectives coexisting; although, a breakdown of constitutional dialogue where nothing is shared in common could lead to a constitutional "failure" as during the Civil War. See also Wayne Moore, *Constitutional Rights and Powers of the People* (Princeton: Princeton University Press, 1996), arguing that multiple perspectives may exist outside of "official" constitutional channels.

not in the neat unfolding of Supreme Court opinions toward a higher end, but in the heated terrain of political dispute.[31]

Chapters 2, 3, 4, and 5 of the dissertation turn to four historical periods of constitutional conflict to illuminate the Madisonian Constitution.[32] By looking at different institutions on different constitutional issues at different points in time, these cases are selected to represent various periods in our history, multiple constitutional issues, and different constitutional actors (and conflicts and debates). Thus the studies attempt to capture a range of constitutional politics, not just a few discrete instances that cut against judicial supremacy and the legal Constitution that, in Justice Roberts words, "are good for this day and this train

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[31] Let me say a word about normative concerns and the nature of a written constitution. The Madisonian framework is deeply concerned with normative commitments and underlying constitutional values; it seeks to further and maintain such values through the constitutional framework. It is not, then, open to whatever change happens to come about, or wholly elastic in its view of constitutional values. Rather, it provides a framework within which constitutional debates occur. It does not necessarily call for a single coherent view, or settlement, depending upon the constitutional issues in question. The written Constitution (and the values it rests upon) is more likely to be secured through multiple institutions rather than by way of a single institution acting as the constitutional "enforcer." And here the Madisonian Constitution draws explicitly on the written nature of the Constitution. The Constitution was written so that its terms—constitutional limits and boundaries, the rights and powers of the people—would be clear to all. The ability to read the Constitution—to make sense of it as fundamental law—did not require special training, but could be clearly grasped by the average citizen. Indeed, the very move to mark down the Constitution in writing was a rejection of the unwritten British constitution, not just because it could be easily altered, but because such a constitution was removed from the citizens who were the basis of all legitimate authority in the American mind. The Americans thus rejected Chief Justice Coke's dictum that the law was based on "artificial reason" and therefore the peculiar province of those tutored in the law insofar as it applied to discerning constitutional meaning. This highlights, as well, the fundamental distinction between ordinary law (where this might be acceptable) and the written Constitution. Thus, rooting judicial supremacy in the peculiar training of lawyers and courts undermines the very foundation of a written Constitution as conceived by the Americans. A point vividly brought home by Madison in a letter to Jefferson, when he insisted that these political devices for maintaining the Constitution might fail: these mechanisms "are neither the sole nor the chief palladium of constitutional liberty. The people, who are the authors of this blessing, must also be its guardians." Quoted in Lance Banning, *Jefferson and Madison: Three Conversations From the Founding* (Madison: Madison House, 1995), 21.

[32] As the 14th Amendment was a fundamental constitutional change (implicating both the Court's and the Congress' constitutional power) I am examining post 14th Amendment cases to hold "The Constitution" steady for the cases I am sampling.

only."[33] The cases focus on the details of constitutional dispute and are largely descriptive in nature, revealing that the standard vocabulary of authoritative settlement and its link to judicial supremacy fails to capture the variety of constitutional dispute and settlement. And while these areas have been examined before as the subject of scholarly debate, I view them through the lens of constitutional settlement, using them to illustrate and illuminate the Madisonian Constitution. These studies suggest that constitutional authority is fluid and constitutional meaning is shaped in the political arena. Settling contested constitutional questions is a dynamic process involving the interaction of the branches of government, so that we must understand the branches in relation to

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[33] My approach itself may be labeled "historical-institutionalism" or "the new institutionalism" in that it seeks to investigate the historical functioning of our institutions when contesting constitutional meaning. In this, there is a close connection between my theory and the cases studies I propose to examine. The cases studies themselves should help refine and alter my theory, which may be treated as a working hypothesis. As I am not attempting to formally test my theory, this close connection between "evidence" and "theory" is acceptable. Indeed, my theory is not fully formed, but in the process of being constructed to offer an alternative to our focus on the Supreme Court as the exclusive and authoritative interpreter of constitutional meaning. The case studies should allow me to classify and categorize constitutional dispute in a much richer way than has previously been done, offering us a conceptual handle in speaking about constitutional settlement. Moreover, in describing these cases I can look for possible causal relations and generate hypotheses for future research, which might then be tested in a more rigorous manner.

Even if my case studies are primarily exploratory, the division between this type of case study and a confirmatory case study—where I would rigorously test a hypothesis—is not as stark as it appears. My exploration will involve comparison between my cases, an examination of crucial cases, and even an initial probing of my theory (as well as rival theories). While I suggest that authoritative judicial settlement of constitutional meaning doesn't capture the full range of constitutional settlement, I don't wish to simply disconfirm this view by sampling on a "theory-infirming" case study. Nor do I wish to "confirm" some alternate hypothesis. Rather, I want to examine the range of constitutional settlement and how we arrive at it.

I am theorizing that other types of settlement—unsettlement, constitutional dialogue, and partial settlement—more aptly describe the various ways in which constitutional questions are actually settled. There is hypothesis probing here. But more importantly, I want to offer a more accurate description of constitutional settlement than currently exists. In this way, my larger theorizing doesn't seek to falsify theories that focus on the Court and authoritative settlement so much as incorporate them into a broader theoretical framework. I'm trying to examine what underlies these different types of settlement. This will allow us to speak to how settlement is arrived at and how constitutional meaning is generated, providing us with rich insights into this process and, thereby, a better understanding of our constitutional system.

one another as part of an historical and political process. Moreover, these cases illustrate that constitutional conflict is a perennial feature of our constitutional framework with all the messy features of unsettled meaning, constitutional dialogues, partial settlement, and concurrent tensions and discontinuities in constitutional meaning. In short, these cases suggest that the Madisonian Constitution more aptly captures our constitutional history than beliefs about the legal articulation and settlement of constitutional meaning.[34]

Chapter 2 examines the conflict between the Court and the Congress over the meaning of the Fourteenth and Fifteenth Amendments from 1870-1883. This episode is particularly interesting because it comes after the momentous politics of the Civil War era, a so-called return to ordinary politics, but we see the meaning of these Amendments being shaped not in the heat of the Civil War, but in the far more ordinary politics that follow. Moreover, in the early years we see conflict between the Congress and the Court on the meaning of rights where, according to much of constitutional theory, we should see the Court protecting rights in a principled manner against the Congress. The opposite is true. And the

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[34] Existing empirical work leads us to be skeptical of the claims of judicial supremacy. Gerald Rosenberg has shown that Supreme Court opinions do not immediately bring about the constitutional practices they call forth, Robert Dahl has shown that the Congress and the President "do generally succeed in overcoming a hostile Court on major policy issues," and Jeffrey Segal and Harold Spaeth have shown that the Court does not always follow its own pronouncements on constitutional meaning. While these works are crucial, my study takes a different tack. See, Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991), Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker" *Journal of Public Law*, 288, Mark Graber, "The Nonmajoritarian Difficulty" *Studies in American Political Development* 7 (1993), Barry Friedman, "A History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy" 73 *New York University Law Review* 2: 333-433 (1998) and Jeffrey Segal and Harold Spaeth, *Majority Rule or Minority Will: The Supreme Court's Adherence to Precedent* (New York: Cambridge University Press, 1998). Although this alone could hardly support Segal and Spaeth's contention that Court opinions are the result of the justices' political preferences and are almost never influenced by

event that paves the way for a constitutional settlement is the switch in Congress in the election of 1874, where it retreats from the early promise of the Civil War Amendments so that by the time the Court renders opinions on the reach and meaning of the Fourteenth and Fifteenth Amendments, it is essentially in line with the Congress's view.

Chapter 3 explores the national government's first entry into national economic regulation and the Supreme Court's reaction, from 1895-1925. This period is too often treated as the precursor to the New Deal struggle of the 1930s, where the "conservative" Court struck down progressive legislation. This period witnessed a three decades long constitutional debate about the government's power to regulate the national economy that remained, by and large, unsettled even as the political branches and the Court engaged in a sort of constitutional dialogue. It is difficult, then, to treat the New Deal revolution that followed as a singular and rare moment of constitutional conflict, when it is placed in this larger context of constitutional drift and unsettlement. The details of constitutional conflict during this era also make it difficult to sustain the notion that a conservative court was striking down progressive legislation: the Congress itself often invited the Court to construct constitutional meaning, illustrating the important interaction between the branches of government in negotiating constitutional meaning.

Chapter 4 picks up with the national government's attempt to regulate the economy, which, after years of unsettlement, was firmly settled by the New Deal politics of 1935-1941. Here the Court came into line with FDR's constitutional

vision, providing for sweeping regulation of the economy. Yet, this very settlement provoked a profound constitutional debate about the role of the Court in protecting constitutional rights (what would become civil liberties) that remains unsettled to the current day. This movement reveals that some constitutional issues might be settled even while others remain unsettled and essentially contested, making it difficult to speak of coherent constitutional regimes, as there were tensions and discontinuities in constitutional thought at the very core of the New Deal revolution that, over the course of years, fell away from the initial settlement and pulled apart the logic of the New Deal Constitution.

The attempt to unsettle the New Deal is taken up in Chapter 5 with President Reagan's attempted constitutional reconstruction. While Reagan's attempt to displace the New Deal and reconstruct our constitutionalism is often characterized as a failure, such characterizations are too hasty in focusing on whether a full scale constitutional "revolution" occurred. Reagan did not succeed in over turning such cases as *Roe v. Wade*, which was a central part of his criticism of the Court. Yet he did succeed in chastening the New Deal view of national power and bringing back constitutional federalism: the Reagan justices of the Rehnquist Court have placed limits on the reach of Congress' Commerce Power for the first time since the New Deal revolution and, at the very least, have reopened a once settled area of constitutional meaning. That this has occurred while these same Reagan justices upheld a women's constitutional right to abortion—although this area also moves back and forth—reveals how constitutional change occurs in some areas and not in others, in fits and starts,

without leading to full scale constitutional transformation. Indeed, such is the course of American constitutional development.

By placing the Court within the political framework, scholars have shown that it is not a distant countermajoritarian institution upholding our Constitution against political encroachments.[35] Coming from another angle, I want to show how the political branches are central to maintaining the Constitution. Blinded by our focus on the legal Constitution and the Court, we rarely investigate how these political branches are a central part of our constitutionalism. I should also note, here, that this does not imply the vulgar characterization—often put forward by behavioral political science—that debates about constitutional meaning are all crass politics.[36] Rather, by situating constitutional debates within a larger institutional framework, we see that shaping constitutional meaning is far more political than constitutional theory often recognizes, but, just as surely, our political institutions are far more important to our understanding of constitutionalism than we often realize.

Thus, while scholars like Robert Dahl have led us to be skeptical of the Court's countermajoritarianism, they have little to say about the performance of the political branches in constitutional terms. I hope to speak to both prongs of this issue by investigating how our constitutionalism actually functions. In situating Court opinions within the give-and-take of constitutional politics, we

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[35] Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker" *Journal of Public Law*, 288; Mark Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary"; Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*

[36] See, for example, Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993).

cannot only ask whether Court opinions authoritatively settle constitutional meaning, but empirically investigate the presuppositions of judicial supremacy. Many proponents of judicial supremacy may well agree that the Court is countermajoritarian, but they see this as a good thing, as it protects the Constitution against politics. Embedded in their thinking is an insistence that the political branches are threats to our constitutionalism. Yet, how have the so-called political branches actually functioned when it comes to protecting rights and maintaining constitutional limits? Is the Court's performance truly better in this regard, as is so often asserted? Does this vary across institutions and over time, so that we must be attuned to the historical interplay between the institutions and not simply preoccupied with the Court? These are empirical and historical questions that are more often asserted than investigated. Even the leading proponents of judicial supremacy acknowledge that "the empirical dimension [of their claim] cannot be avoided."[37] They further acknowledge that the historical functioning of our system must play a role in any empirical analysis, especially when discussing the political branches' relationship to questions of constitutional settlement. Other scholars have similarly insisted that a "sustained historical analysis" with more concern for the actual practice of constitutional settlement is central to this debate.[38]

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[37] Larry Alexander and Fredrick Schauer, "Defending Judicial Supremacy: An Argument" *Constitutional Commentary* 2000 Vol. 17: 455-482, 464.

[38] Stephen Griffin, "Has the Hour of Democracy Come Round at Last? The New Critique of Judicial Review" *Constitutional Commentary* 17:683 (2000), 693; Howard Gillman, "From Fundamental Law to Constitutional Politics—And Back" *Law and Social Inquiry*, 199. Bruce Peabody, "Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research" *Constitutional Commentary* Vol. 16: 63 (1999).

Labeling these contests "constitutional politics" raises an important question of how we separate constitutional politics from ordinary politics.[39] How do we know, for example, that such disputes are not merely political and policy disputes disguised as constitutional disputes for rhetorical purposes? One way, which I take up in the chapters that follow, is when we see the political branches exhibiting a commitment to constitutional text.[40] But I do not limit my analysis to cases where the political branches display fidelity to constitutional text. In part I suggest that a Madisonian view of the Constitution makes this easy distinction between politics and the Constitution difficult. In attempting to maintain constitutional boundaries and propriety, the Madisonian solution relies in part on the self-interested action of the various actors: "the interests of the man will be connected to the constitutional rights of the office."[41] It is not always easy to separate constitutional views from policy preferences or the politics of the day. In fact, debates about constitutional meaning are almost certainly rooted in the politics of the day, which is why a historical analysis that examines the development of constitutional meaning—and not simply looking at Court opinions—is key to understanding our constitutionalism. It would be very difficult, for example, to make sense of Justice Stone's famous argument for judicial review in footnote 4 of *Carolene Products* without understanding the

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[39] In treating Supreme Court cases as disputed by the political branches, I rely on the pronouncements and actions of the political branches themselves. The branches must make some effort to challenge the opinion. They may insist that they are not bound by the Court's opinion, refuse to enforce it, or attempt by legislation, pronouncement, or judicial appointment to overcome the Court's interpretation. This would even include a sustained rhetorical assault on the Court's opinions.

[40] Gillman, "From Fundamental Law to Constitutional Politics—And Back," 199-200.

preceding development of "substantive due process" in *Lochner v. New York* and the politics that surrounded that decision.[42] Given this, I suggest that constitutional politics is any broad attempt to shape or alter constitutional meaning. It is constitutional in the broad sense that it contributes to our constitutional discourse, speaks to and shapes constitutional meaning, and accepts that we are governed by the Constitution (even while disputing the particulars of what that means).[43] While such constitutional struggles are rooted in the political disputes of the day and shape how we think about the Constitution, my concern is describing how such contests over constitutional meaning play out between the branches of government rather than with whether or not any particular view of the Constitution put forth by those branches is correct.[44]

Constitutional politics—with continued dispute, unsettled meaning, and discontinuities—is a sustained and continuous part of American constitutionalism. Against this backdrop, judicial supremacy operates as a blinding myth. Its claims are unsubstantiated and yet they continue to dominate constitutional scholarship, ignoring the rich terrain that our constitutionalism occupies. I hope to show that constitutional questions often remain unsettled, are reopened, and, when

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[41] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Mentor Books, 1999), no. 51, 290.

[42] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) and *Lochner v. New York*, 198 U.S. 45 (1905). See Paul Pierson, "Not Just What, but When: Timing and Sequence in Political Processes" *Studies in American Political Development*, 14 (Spring 2000) 72-92.

[43] See Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (New York: Oxford University Press, 2000) 20-22.

settlement does occur, it is usually forged by way of political consensus over time and not at a single moment with the handing down of a Supreme Court opinion. A great benefit here is properly situating a discussion of Supreme Court opinions and constitutional law within the framework of American politics as a whole.[45] This should help give some measure to our Court-centered discussion. As it stands, scholars give us legal theories that—to put it bluntly—nobody believes, and dramatic assertions about the importance of judicial decisions that are flatly unsupported by empirical evidence.[46] We rage as if the Court's opinion was everything, when in fact it is not. Focusing only on the Court, we miss the ways in which the political system itself—the broad constitutional framework—plays an ongoing role in maintaining (and creating) constitutional meaning. In articulating this view, I hope to overcome the deeply ingrained myth of judicial supremacy and recover a political understanding of the Constitution.

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[44] Again, that's not to discount normative concerns, they are just not the key to this study. While this study seeks to look at the actual functioning of our constitutionalism, it would still be fully compatible with strong normative views of constitutional meaning. Indeed, it suggests that the best way to protect the proper reading of the Constitution is interpretive plurality rather than always siding with a particular branch. Thus we may go with the branch that we think is right in any constitutional dispute.

[45] See Howard Gillman and Cornell Clayton's "Introduction" in their edited volume, *The Supreme Court in American Politics: New Institutionalist Interpretations* (Lawrence: University Press of Kansas, 1999) 1-11.

[46] Rosenberg, *The Hollow Hope*. For a critique of Rosenberg see Bradley Canon and Charles Johnson, *Judicial Politics: Implementation and Impact* (Washington, D.C.: CQ Press, 1999) 209-211. While Canon and Johnson reveal some of the shortcomings of Rosenberg's work, they themselves demonstrate in their discussion of abortion that the Court's opinions are hardly the whole story, 3-16.

CHAPTER 1

RECOVERING THE POLITICAL CONSTITUTION

"That all power is originally invested in, and consequently derived from the people.

That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

"That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse to the purposes of its institution."—James Madison[1]

"Now, it is the proper function of the judicial department to interpret laws, and by the very terms of the constitution to interpret the supreme law. Its interpretation, then, becomes obligatory and conclusive upon all the departments of the federal government, and upon the whole people, so far as their rights and duties are derived from, or affected by that constitution."—Joseph Story[2]

Constitutionalism in the American tradition suffers from two distinct but related problems. In the first place, there is the insistence upon a written constitution as fundamental law that "prescribes the limits of all delegated power."[3] This move, so much a part of early American constitutional thought, is so that the government may truly be said to be limited. The second problem arises from just this point though: how do we make these written limits effective? The mere act of writing is itself no guarantee. If the legislature could alter the Constitution at will, even if written, then we are right back where we started. The question was how to bring this fundamental law down to earth, so that it might

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[1] James Madison, proposed amendment with what became the Bill of Rights, which Madison sought to place as the opening of the Constitution, with the other proposed amendments weaved into its body, rather than tacked on to the end, in what became know as the Bill of Rights.

[2] *Commentaries on the Constitution of the United States*, reprinted with an Introduction by Ronald Rotunda and John Nowak (Durham: Carolina Academic Press, 1987 [1833]) 128.

[3] Wood, *Creation of the American Republic* (Chapel Hill: University of North Carolina Press, 1998) 281.

actually be effective in maintaining the very limits it purported to establish.[4] How, then, do we bond the polity to the word of the Constitution, in William Harris' phrase?[5] James Madison's solution was structural and political. But it was supplemented by another that both complemented it and pulled it in a different direction. This solution, the legalist solution, makes the Constitution, as law, cognizable in courts. In this way the Constitution becomes effective and permanent by making its limits enforceable in the courts, just like ordinary law. As Gordon Wood has said, "What in the final analysis gave meaning to the Americans' conception of a constitution was not its fundamentality or its creation by the people, but rather its implementation in the ordinary courts of law."[6]

The legal view of the Constitution and its solution to the problem of constitutional governance is, in fact, the popular understanding of constitutional enforcement.[7] In this view, the Constitution functions as law articulated by the Court, which insists upon constitutional limits by exercising its power of judicial review. The Supreme Court itself has pushed this argument, insisting that it

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[4] As Gordon Wood says, "There was therefore no logical or necessary reason why the notion of fundamental law, so common to Englishman for over a century, should lead to the American invocation of it in the ordinary courts of law. Indeed, in an important sense the idea of fundamental law actually worked to prohibit any such development, for it was dependent on such a distinct conception of public law in contrast to private law as to be hardly enforceable in the regular court system." *Creation of the American Republic*, 292. This is a point Edward Corwin noted earlier in suggesting that a constitution's status as fundamental law was a hindrance to its legality, "Marbury v. Madison and the Doctrine of Judicial Review." See especially Robert Burt, *The Constitution in Conflict* (Cambridge: Harvard University Press, 1992) 59-76.

[5] William Harris II, *The Interpretable Constitution* (Baltimore: Johns Hopkins University Press, 1993).

[6] Wood, *Creation of the American Republic*, 291. Similarly, Edward Corwin has remarked that "the *supremacy* of constitutions was a real barrier to their *legality*." Corwin, "Marbury v. Madison and the Establishment of Judicial Review" *Michigan Law Review* 12: 538, 555 (1914) emphasis in original.

[7] See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

"speaks" for the Constitution and that once it has spoken we are bound by its interpretation of the Constitution.[8] In fact, the Court has gone so far as to say that as a people we are tested in taking our constitutional ideals seriously by our willingness to adhere to the Court's interpretation of the Constitution. Living up to our constitutional ideals depends, in no small measure, upon our willingness to heed the Court's voice.[9] This rather dramatic claim to judicial supremacy suggests that the Constitution will cease to function as law if it is not authoritatively interpreted by the Court, which means that the other branches of government, no less than the people, are bound by the Court's view of constitutional meaning: it is the Court—whether exclusively or finally—that gets to define the substance of the Constitution. If the political branches can read the Constitution in their own light, and thereby disregard or second-guess judicial interpretations, then we are no longer living under the Constitution, or so advocates of judicial supremacy would have us believe.[10]

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[8] For a clear statement of this see *City of Boerne v. Flores* 521 U.S. 507, 529 (1997); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

[9] "Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals." *Planned Parenthood v. Casey,* 505 U.S. 833, 868 (1992). See also, John Brigham, *The Cult of the Court* (Philadelphia: Temple University Press, 1987).

[10] See especially Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation" *Harvard Law Review* Vol. 110, No. 7: 1359-1387. Scott Gant qualifies the notion of judicial supremacy by suggesting that the judiciary is not the exclusive interpreter of the Constitution, but that its interpretations are, once given, authoritative—at least in the short run. Gant, "Judicial Supremacy and Nonjudicial Interpretation of the Constitution" *Hastings Constitutional Law Quarterly* 24:359-440 (1997).

If we see the Constitution as a political framework, the insistence on the judicial enforcement of the Constitution is much more problematic.[11] The aim of this chapter is conceptual and theoretical, it is a sort of "constitutional theory as political science."[12] First, I argue that a Madisonian view of the Constitution emphasizes constitutional structure and institutional design as central to Constitutional maintenance—not simply judicial enforcement. As originally conceived the political framework itself invites "interpretive plurality," suggesting that questions of constitutional interpretation would be resolved as part of constitutional politics and often in the ordinary political process. Multiple and even conflicting views of the Constitution are an inherent—even healthy—part of

[11] Walter Murphy, "Who Interprets?" *Review of Politics* 48: 401 (1986); Mark Graber, *The Civil War as a Constitutional Failure* (unpublished manuscript); Stephen Griffin, *American Constitutionalism: From Theory to Politics* (Princeton: Princeton University Press, 1996); Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 1999); Wayne Moore, *Constitutional Rights and Powers of the People* (Princeton: Princeton University Press, 1996); William Harris, *The Interpretable Constitution* (Baltimore: Johns Hopkins University Press, 1993); Mark Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton: Princeton University Press, 1998); Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1989); Susan Burgess, *Contest for Constitutional Authority* (Lawrence: University Press of Kansas, 1992); Gary Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration* (Lanham, MD: Rowman and Littlefield, 1986); Neal Devins, *Shaping Constitutional Values* (Baltimore: Johns Hopkins University Press, 1992); and Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton: Princeton University Press, 1988).

[12] Keith Whittington, "Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory" *University of Richmond Law Review* 34:509 (2000).

the constitutional framework.[13] Second, to draw out Madison's political Constitution I examine his participation in early constitutional debates. To see the Constitution through a Madisonian lens suggests a close connection between constitutional theory and history: examining the Constitution as an institutional dynamic invites us to view how this dynamic has actually worked (and changed) in the course of American constitutional development. The articulation and development of constitutional meaning from the political branches is a key part of bringing the Constitution to life and maintaining a functioning constitutional system. I suggest that we may situate judicial review within this framework and see constitutional law as a part of this larger constitutional whole. Third, I examine the connection between judicial supremacy and the legal Constitution. By beginning from the premise that the Constitution is law, the proponents of judicial supremacy make the Court the enforcer of the Constitution and come very close to focusing on constitutional law as the whole of our Constitution. Yet in doing so they subvert the constitutional framework and pull against the nature of a written constitution, even while drawing on Madison's separation of powers to do so. By making constitutional questions legal questions, and therefore the peculiar

[13] I should also note that when I refer to the Madisonian Constitution or the Madisonian solution to maintaining constitutional government, I don't mean to suggest that it has developed exactly as Madison himself would want it to, or that it is "proper" because Madison saw it this way. Rather, I argue that the system can be described as Madisonian because it operates broadly as he suggested even if many of the particulars go against his own vision. For example, even if we could find definitive proof that Madison was against judicial review, we could still describe judicial review as functioning within the Madisonian view of checks and balances. Madison was deeply skeptical of a continual return to constitutional issues. In *Federalist 49*, Madison insisted that reverence for the laws—and for the Constitution—was necessary to the health and tranquility of the polity. "The danger of disturbing the public tranquility by interesting too strongly the public passions is a still more serious objection against a frequent reference of constitutional questions to the decisions of the whole society." While Madison was speaking specifically against turning frequently to the people on constitutional questions, his point is equally applicable to making constitutional questions frequent matters of public debate.

province of courts and lawyers, the Court is placed above the Constitution rather than within it. Moreover, by making the written Constitution the peculiar province of courts and lawyers, we move against it very purpose as a public document open and accessible to all citizens.

While judicial supremacy has come under fire from both the left and the right, these critiques tend to focus on the contemporary court and particular judicial decisions, driven by normative and polemical concerns of constitutional interpretation. The insistence is often that the Court got it wrong in this or that instance. The plea is usually for more judicial restraint, a particular theory of interpretation, or, on occasion, a repeal of judicial power.[14] My concerns here are driven more by a desire to look at the actual functioning of our system (which is taken up in great detail in the chapter that follow). Yet, one of the benefits of thinking of the Constitution in political terms is that it moves us beyond debates about judicial activism or restraint, both of which have their feet in the legal view of the Constitution. Both, I argue below, are outgrowths of John Marshall's opinion in *Marbury v. Madison*. Those who look to Marshall's insistence that the Court is the primary enforcer of constitutional limits see the need for an active judiciary—it is the essence of maintaining the law.[15] On the other hand, this very same concern, with its potentially expansive view of judicial power, has led others

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[14] See Michael Perry, *We the People: The Fourteenth Amendment and the Supreme Court* (New York: Oxford University Press, 1999), 3-14; Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999), 6-32; Cass Sunstein, *One Case at a Time: Judicial Minimalism and the Supreme Court* (Cambridge: Harvard University Press, 1998); Scott Douglas Gerber, "The Judicial Brezhnev Doctrine" *Harvard Journal of Law and Public Policy* (2000). "The End of Democracy?" *First Things* November 1996, especially Robert Bork's "Our Judicial Oligarchy" and Robert George's "The Tyrant State."

[15] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1987).

to plead for judicial humility. As judicial opinions are taken to be the final word on the Constitution, the Court ought to defer to the political branches and exercise such power only when these branches are clearly wrong.[16] Each view, though, shares a common premise and it is this premise that I want to get beyond. We cannot meaningfully speak of activism or restraint without understanding what the other branches of government are doing (by looking to the framework), and this is not a constant but something that varies across time.

Too much constitutional debate, then, occurs within Marshall's conceptual framework, or between the "two Marshalls" of *Marbury*,[17] with an occasional if futile nod to Judge Gibson's opinion in *Eakin v. Raub*, calling for the abandonment of judicial review altogether.[18] The Madisonian view offers an alternative vision. Recovering the political Constitution will help us ask whether authoritative settlement by the judiciary—and the avoidance of politics and indeterminacy—is truly central to American constitutionalism. This conceptual clearing away will then let us turn to an empirical examination of the actual functioning of our constitutional system in the course of American constitutional development, which is taken up in the historical studies that follow.

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[16] James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" *Harvard Law Review* 7:129 (1893). See also Alexander Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press, 1962).

[17] Mark Tushnet, "*Marbury v. Madison* and the Theory of Judicial Supremacy" Robert P. George, ed., *Great Cases in Constitutional Law* (Princeton: Princeton University Press, 2000). An exception is Robert Lowry Clinton, Marbury v. Madison *and Judicial Review* (Lawrence: University Press of Kansas, 1989) (arguing that *Marbury* only speaks to the Court's power).

[18] Learned Hand, *The Bill of Rights* (Cambridge: Harvard University Press, 1958).

The Madisonian Constitution

Much like Thomas Jefferson and John Marshall, Madison agreed that a written constitution was our "peculiar security," the great improvement of our "political institutions."[19] And yet Madison was reluctant to rely on the mere writtenness of the Constitution. A written constitution, like written law generally, gives clarity to the rights of the people and to the limitations of the government by way of text.[20] As such, the limits of governmental power would not be subjected to either the whims of the judge or the legislature. All could turn to the written constitution's text and thereby grasp, in advance, the limits and powers of the government. Madison, though, insisted that writtenness, in and of itself, was not enough to preserve the Constitution. The mere act of writing the Constitution, "a mere demarcation on parchment,"[21] did not make it self-enforcing. One could surely imagine, as Marshall did in *Marbury*, a government overstepping its prescribed constitutional limitations—and doing so despite the fact that those limitations are clearly demarcated. If constitutional limitations were not somehow enforced, as Marshall said, then "a written constitution was an absurd attempt on the part of the people to limit a power that is illimitable."[22] On this score Madison agreed with Marshall. To be effective the Constitution had to be maintained. But how?

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[19] *Marbury* at 178.

[20] Gordon Wood, *The Creation of the American Republic*, 275.

[21] *The Federalist Papers*, No. 48, 281.

[22] *Marbury* at 177.

Structure: Political Institutions and the "Self-Governing" Constitution

Madison's great political innovation was to make the Constitution "self-governing,"[23] to create an institutional framework that would police the boundaries of the written Constitution. It is this institutional framework, through the normal operation of the political process, and not just judicial interpretation and judicial review that is responsible for maintaining the constitutional polity. In this sense, Madison's solution to the problem of constitutionalism was political rather than legal.[24] The key to constitutional maintenance for Madison is the very structure the constitutional text calls forth: constitutional design is paramount to the constitutional enterprise.[25] The division of power between the national and state governments, the large republic, and the separation of powers and checks and balances are all institutional innovations that structure our politics in very particular ways: they favor certain political outcomes over others and through the ordinary political process maintain a functioning constitutional system. Constitutional interpretation occurs within this system and allows us to situate disputes about constitutional meaning and the exercise of judicial review within this larger political framework. What I am calling the Madisonian system is

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[23] Michael Kammen, *A Machine that Would Go of Itself: The Constitution in American Culture* (New York: Vintage, 1986).

[24] Michael Zuckert, "Epistemology and Hermeneutics in the Constitutional Jurisprudence of John Marshall" in Thomas Shevory, ed, *John Marshall's Achievement: Law, Politics and Constitutional Interpretations* (Westport: Greenwood Press, 1989).

[25] Jack Wade Nowlin, "The Constitutional Limits of Judicial Review: A Structural Interpretive Approach" *Oklahoma Law Review* 52: 521-564 (1999) and "The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis" *Kentucky Law Journal* 89, 387 2000/2001, Bruce Peabody, "Coordinate Construction, Constitutional Thickness, and Remembering the Lyre of Orpheus" *University of Pennsylvania Journal of Constitutional Law* 2: 662-675 (April 2000), John Dinan, *Keeping the People's Liberties: Legislatures, the Public and Judges as Guardians of Rights* (Lawrence: University of Kansas Press, 1999).

political in the first instance in that it does not suggest that the Constitution will be reduced to neat legal rules by the judiciary acting as the sole constitutional umpire.

The political Constitution, much like the legal Constitution, seeks to limit the power of the government and secure the rights of the people (although that is only part of the picture). The primary difference is the solution to enforcing the very limits the Constitution purports to establish. The legal Constitution attempts to limit government and enforce constitutionalism by way of the text: the very writtenness of the Constitution, as law, is the great way to uphold its limitations—with the judiciary enforcing the text. It is an attempt to bond the polity by way of text.[26] But can the polity be bound by words—by the written Constitution, with the judiciary enforcing the text? The political Constitution, as articulated most fully by Madison, is reluctant to rely on "mere parchment barriers;" it doubts the simple power of text. Thus the political solution, as Mark Graber suggests, "limited power primarily through institutional design."[27] Following this, fundamental constitutional arrangements cannot be seen in legal terms and cannot be reduced to legal rules, as "the scope of constitutional law is necessarily narrow."[28] In this vein, the Constitution is not the equivalent of law enforced by the judiciary.

The Constitution is an active institutional framework, a sort of "living constitution." Constitutional exposition and development, as well as maintenance,

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[26] William Harris, *The Interpretable Constitution*, 2.

[27] Mark Graber, *The Civil War as a Constitutional Failure*, 23.

[28] Griffin, *American Constitutionalism*, 45.

takes place within a political process that is structured by the Constitution (as institutional design) and is not simply "free floating."[29] Part of my project is to link this institutional framework with the question "Who interprets?", thus locating the discussion of constitutional interpretation in the context of the political Constitution and judicial review in the context of the separation of powers. The "jurisprudential model," as Keith Whittington calls it, leads us to focus on the legal Constitution at the expense of the political Constitution. Yet constitutional maintenance is fundamentally a political task and the political branches play a central role here even if it is at times tacit or indirect. To recover the political Constitution is to recognize that even if it is law, it is law of a fundamentally different sort.[30] And if it is, then we may ask not only what it means to settle constitutional meaning authoritatively, but whether such "settlement" is central to the constitutional enterprise. If we see the Constitution in more Madisonian terms, authoritative settlement does not necessarily come from the judiciary. But this may also suggest that authoritative settlement is not the primary constitutional value: many constitutional issues can be left unsettled or worked out within the confines of the political process, subject to change and

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[29] Brandon, *Free in the World*, 140, 6. See also Wayne Moore, *Constitutional Rights and Powers of the People*.

[30] Griffin, *American Constitutionalism* and especially Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990). See also George Thomas, "As Far as Republican Principles Will Admit: Presidential Prerogative and Constitutional Government" *Presidential Studies Quarterly* 30: 3: 534-552 September 2000 (situating prerogative within the political Constitution).

revision over time.[31] To see the Constitution through a Madisonian lens is to realize that the "Constitution does not always speak through the judiciary and does not always speak with one voice."[32] It is also to recognize, as a corollary, that not all constitutional issues are legal issues resolvable by the judiciary.[33] Constitutional interpretation is only a part of the constitutional enterprise. And, moreover, as much recent scholarship has shown, it is not a distinctly legal enterprise connected only to the judiciary. The executive and the legislature also have a role to play when in comes to constitutional interpretation.

Coordinate Construction: Interpretation within the Constitutional Structure

Interaction between the branches of government over constitutional meaning—often involving high issues of constitutional interpretation, perhaps involving more ordinary politics—is a central feature of settling such meaning (if it even need be) and fits within the system of checks and balances and separation of powers. Scholars have long insisted that the judiciary is not the sole or authoritative interpreter of constitutional meaning. If we take the Constitution seriously, as Edward Corwin has argued, we are bound by the Constitution and not the Court's interpretation of it, which are not the same thing.[34] Thus the other branches of government must have a say in constitutional interpretation.

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[31] Tushnet, "*Marbury v. Madison*," 43. As Justice Brandeis argued in *Ashwander v. TVA*, 297 U.S. 288, 346 (1936), "constitutional issues . . . will not be determined in advance of the necessity of deciding them" thus keeping the constitutional issue open and flexible. See also, Keith Whittington, "Extrajudicial Interpretation—Three Objections and a Response."

[32] Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review,* 172.

[33] Ibid. 172, 174. See also, Bruce Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991); Burt, *Constitution in Conflict*, Griffin, *American Constitutionalism.*

[34] *Marbury v. Madison*, 555. See also Levinson, *Constitutional Faith*, 43.

Coordinate construction, or departmentalism, as this has come to be known,[35] emphasizes the political nature of the Constitution more than we often realize. It is not just that the president and Congress have a legitimate say in interpreting the Constitution. The point I want to make is deeper. It is that debates over constitutional meaning are not simply legal debates that call for judicial resolution; rather, such debates can be a part of a larger political dynamic that is part of bringing the Constitution to life and finding workable solutions to constitutional problems. John Agresto frames the issue perfectly:

> If, following Marshall, we base our understanding and defense of judicial review on the idea that "the Constitution is law," then the primacy of the Court in the American system of governance becomes more set. But if our basic view of the Constitution begins not with what the Constitution is—law—but with what it establishes—a constitutional democracy of separated powers, checked and balanced—then the activity of judicial review becomes part of an interlocking totality of governance. In other words, the idea of the Constitution as law interpreted by judges and the idea of the Constitution as a framework for limited government may well lead to different results. 36

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[35] Murphy, "Who Shall Interpret?" and Walter Murphy, James Fleming, and Sotirios Barber, *American Constitutional Interpretation*, second edition (Westbury, NY: The Foundation Press, 1995) 260-378. Thomas Jefferson, Andrew Jackson, and Abraham Lincoln all defended, at times, variants of departmentalism—as did Madison. As Andrew Jackson said in his statement vetoing an act to continue the Bank of the United States, "it is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent." In his First Inaugural, Lincoln similarly refused to be bound by the Court's settlement in *Dred Scott*: "I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all parallel cases, by all other departments of the government. . . At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal."

[36] Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca: Cornell University Press, 1984) 71.

And surely they do. Political constitutionalism begins from the institutional framework, whereas judicial supremacy begins from the axiom that the Constitution is law.

To understand Madison's political constitutionalism we must begin from the governing framework the Constitution establishes. We can see how our Constitution structures our politics in very particular ways by focusing on what Mark Tushnet calls our "thick" Constitution.[37] The thick Constitution focuses on such things as the bicameral structure of Congress, the unitary executive, the independent judiciary, the division of powers between the states and the national government, the fact, even, that one must be of a certain age before being eligible to take office. A glance at much of current constitutional law and theory might suggest that this is all "mere surplusage" in Marshall's phrase.[38] Oddly, though, it is the bulk of our Constitution. Indeed, the structure of our Constitution dominated early constitutional debates and thinking.[39] Paying attention to the actual institutions the Constitution creates will allow us to address two important and intimately related points. In the first place it will show us how institutional design was meant to preclude certain possibilities and maintain constitutional boundaries without resorting, in most cases, to the law, but instead relying on politics.[40] In a similar fashion, Madison sought to make it nearly impossible for one branch of the government—perhaps dominated by a majority—to ignore the

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[37] Tushnet, *Taking the Constitution Away from the Courts*.

[38] *Marbury* at 174.

[39] Jack Wade Nowlin, "The Constitutional Limits of Judicial Review: A Structural Interpretive Approach."

[40] Griffin, *American Constitutionalism*, 59-87.

Constitution's putative limits. Madison was concerned with maintaining rights and constitutional propriety, yet his solution to these problems lay in structuring our politics in a particular manner and not merely by writing them down, say, in a bill of rights.[41] As Tushnet suggests, even while arguing that we may forgo the thick Constitution, it is the thick Constitution that gives the political branches incentives to maintain constitutional propriety.[42] The political Constitution is, in fact, as preoccupied by rights and principles as is much of modern constitutional theory and interpretation. Rather than appealing straight to moral theory, however, or moral theory disguised as neutral constitutional interpretation, the political constitution seeks political solutions—institutional solutions—that are the means of achieving constitutional values and principles.

It is interesting, in this light, that the *Federalist Papers*, the great exegetical writing on the Constitution, rarely refers to what we would today call constitutional law. Rather, the *Federalist Papers*, particularly Madison's writings, refers to the institutional dynamic of the new Constitution.[43] In explaining why the new Constitution is a great improvement in political institutions and how it will effectively provide for limited (and effective) government, Publius devotes

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[41] Ibid. See also, Bruce Peabody, "Coordinate Construction, Constitutional Thickness, and Remembering the Lyre of Orpheus" and Dinan, *Keeping the People's Liberties*.

[42] Tushnet, *Taking the Constitution Away From the Courts*, 95-128. See also, Jack Knight and Lee Epstein, "On the Struggle for Judicial Supremacy" *Law and Society Review* 30:87-120 (1996).

[43] This has perhaps changed with the ratification of the 14th Amendment, which arguably paved way for the legalization of the Constitution shifting our focus to rights (and the Courts) and away from constitutional structure. But such a reading relies on a legalist view of the amendment overlooking the fact that Congress seems to have been entrusted by way of section 5 with defending (and perhaps defining) constitutional rights. Furthermore, recent scholarship casts serious doubt on any special connection between rights—even in a bill of rights—and the judiciary, suggesting that the articulation of rights fits within a political view of the constitution. See especially, Akhil Amar, *The Bill of Rights* (New Haven: Yale University Press, 1998) and Dinan, *Keeping the People's Liberties*, 10.

the bulk of the *Federalist Papers* to the institutional forms of the new Constitution. Madison's most famous discussion of this comes in the widely cited *51st Federalist Paper*. *Federalist 51* begins by asking how we are to maintain "in practice the necessary partition of power among the several departments as laid down in the Constitution?"[44] Madison says that the first reliance on maintaining constitutional boundaries is supplied by "exterior provisions." That is, the primary reliance on maintaining constitutional forms comes from the large republic, federalism, the nature of representation, and so forth, which sustain the constitutional polity by structuring politics in a particular way. However, lest these devices fail, we must trust in auxiliary precautions: "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[45]

While power is separated, it must also be checked. Lest the legislature, Madison's first concern, encroach upon the powers of the executive, or overstep its constitutionally limited bounds, the executive should be fortified with a negative (the veto) against the legislature. The negative, however, should not be absolute, lest the executive, although the weaker branch, overstep its constitutional limits. While a written constitution is a great improvement in clearly enumerating the powers of government and its limitations, it is not, of itself, "self-enforcing." What is needed is to order the Constitution, to give it life,

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[44] The Federalist Papers, No. 51, 288.

[45] Ibid. at 288. For a discussion of the solutions Madison rejected, see Burt, *The Constitution in Conflict*, 47.

so to speak, in such a way that the various parties under it will have an interest in maintaining its boundaries: "But the great security against a gradual concentration of the several powers in the same department consists in giving those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[46] To drive home this point Madison argued, "The interest of the man must be connected with the constitutional rights of the place."[47] Constitutional limits will be maintained in that those who hold office under it will have an interest in enforcing its written provisions; indeed, an institutionally structured self-serving interest! Tushnet has insisted that the political branches, of which we are so suspicious, often have "incentives" for adhering to the Constitution, which aptly captures Madison's idea. The branches of government themselves, often referring to the text of the Constitution to answer particular questions, would police the Constitution's boundaries in their political capacity through the framework. The larger design was to limit power by structure, not narrow legal rules. As Jack Rakove argues, the Constitution would be interpreted and enforced primarily by way of the political branches. In fact, as Rakove argues, Madison, like most Federalists, thought the "[r]eal interpretation of the Constitution would occur as decisions taken within government gradually settled its operations in regular channels."[48]

At the same time, Madison recognized that "in the ordinary course of government . . . the exposition of the laws and the constitution devolves upon the

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[46] Ibid. at 289.

[47] Ibid. at 290.

judicial branch." But, he insisted, this did not mean that the Court was, in any way, the final arbiter on the meaning of the Constitution, particularly when it came to "the limits of the powers of the several departments." Here Madison insisted, as many future presidents would, that none "of these independent departments has more right than another to declare their sentiments on that point."[49] To give that power to the judiciary, Madison argued, was not only to make that department "paramount in fact to the legislature, which was never intended," but, even more problematic, it was to render the Constitution a mere legal document. Yet, can this be avoided? As Stephen Griffin suggests, "The experience of American constitutionalism shows that you can maintain the written quality of the constitution only at the expense of abandoning the framework character of the document and you can maintain the framework character of the constitution only by abandoning the idea that all important constitutional change must occur through formal amendment."[50] Griffin's point about amendment may be open to question, but he is certainly right to highlight the tension between the "text" of the Constitution and the "framework" character, which does seem to call forth a kind of constitutional politics, open to the possibility of constitutional conflict and change by way of the framework.

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[48] Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996) 345.

[49] *Annals of the First Congress*, I, 1789 (June 16th and 17th). See also Rakove, 348. It is interesting to note that the "great" presidents all advocated their power of constitutional interpretation against the Court, often going so far as to engage in constitutional politics and articulating their own "constitutional vision," which, as reconstructive presidents, all became dominant. See Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to George Bush* (Cambridge: Harvard University Press, 1993).

[50] Griffin, *American Constitutionalsim*, 41.

The point I wish to address is twofold: Madison insists upon a political Constitution policed by the separation of powers. Not only would the Constitution be maintained, once the system of checks and balances was set in motion, but the exposition and interpretation of the Constitution would be done by these very same branches of government—and primarily by the legislature and executive. This framework character of the Constitution invites the political branches to speak to, create, and settle constitutional issues, raising important questions of how they do so. At the same time, the very logic of checks and balances also gives rise to the notion of judicial review. Interestingly, Madison does not refer to judicial review in *Federalist 51*, his most prominent discussion of checks and balances. But the nature of judicial review itself seems to be part of the institutional logic he spells out in *Federalist 51*. It is, seemingly, the judiciary's check on the legislature and the executive. But, paradoxically, this check appears to elevate the judiciary above the legislature and executive if the judiciary is given "the unique power to enforce the Constitution" as the "Constitution structures politics and government."[51] Moreover, such a move gives the Constitution a legalist gloss, even if that seems latent in the document itself. The power of judicial review "arises circumstantially, literally through the chronology of action—yet absent any conflicting vision, it expresses the latent intent of the document itself."[52] Checks and balances seem to give rise to judicial review,

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[51] Ibid. 45.

[52] Ibid. As Robert Scigliano has suggested, "[T]he answer to the question we posed—To whom does the Constitution give the final authority to interpret its provisions?--must be: the Supreme Court. There is no practical alternative, if the constitutional plan is to be followed." *The Supreme Court and the Presidency*, 17.

which coupled with the legal Constitution, leads to judicial supremacy. Can an independent judiciary exercising judicial review be placed within the constitutional framework rather than above it?

Those who insist on a sort of departmentalism, or coordinate construction, in constitutional exposition seek to relocate a discussion of constitutional interpretation in the context of the separation of powers. Even if we make this move, however, judicial review may still be problematic. It is not simply that judicial review is a check on the other branches of government, but that it is based on the notion that the Court is peculiarly suited to the task of interpreting the Constitution (as it is law). In our day we tend to think of the separation of powers as an essentially preventative check; that is, it effectively, if inefficiently, puts the brakes on governmental power. Such a view of the separation of powers comes to us from Woodrow Wilson and other Progressive critics, and fails to notice the peculiar effectiveness of the separation.[53] It is not simply that power is divided between different branches of government, but that the branches themselves are structured in a manner that makes them suited to their particular tasks.[54] To follow this logic is to impart the Court with the constitutional function of passing on the constitutionality of legislation, as Laurence Tribe suggests. As Tribe would have it, the separation of powers gives rise to a sort of judicial finality in that the Court,

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[53] Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1910). As Wilson said of Madison's "Newtonian" system: It is a government tied up in a "nice poise," held in "inactive equilibrium."

[54] Martin Diamond, "The Separation of Powers and the Mixed Regime" in his *As Far as Republican Principles Will Admit* (AEI Press, 1992) 58-67. See also Jeffrey Tulis, *The Rhetorical Presidency* (Princeton: Princeton University Press, 1986); Jessica Korn, *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto* (Princeton: Princeton University Press, 1996) and Daniel Stid, *The President as Statesman: Woodrow Wilson and the Constitution* (Lawrence: University Press of Kansas, 1998).

unlike the explicitly political branches, is suited to the task of constitutional interpretation.[55] We need not agree with Professor Tribe, but he does put his finger on a peculiar problem. To put the question in the idiom of modern constitutional thinking, can judicial review be separated from judicial supremacy? How this has worked out in practice is an empirical question that is taken up extensively in the chapters that follow, but conceptualizing the Constitution in political terms lets us unlink judicial review from the legal Constitution. To draw again on Murphy's formulation, it allows us to separate the "who of interpretation" from the "what of the Constitution." We can then situate judicial review within the separation of powers rather than above it.

To begin to sort this out I want to turn first to two early constitutional debates in the Congress: (1) the removal debate and (2) the debate over the first national bank. These two cases are illuminating as they are actual attempts by the Congress and the executive, led by Madison, to engage the Constitution. They further illuminate Madison's thinking and demonstrate how his thinking worked out in actual cases, which, in turn, raises questions about the institutional capacity of the various branches of government to speak to constitutional questions in both political and legal ways.

[55] Laurence Tribe, *American Constitutional Law*, third edition, volume one (New York: Foundation Press, 2000).

Madisonian Constructions: Constitutional Politics

The tendency to regard the Constitution as a legal text leads us to focus on constitutional law often at the expense of the Constitution itself.[56] Constitutional law is taken to be the equivalent of constitutionalism. So much so, in fact, that we are preoccupied by the Court and judicial review and, thereby, pay less attention to how constitutional meaning is shaped by the political branches of government in ways that do not even come before the judiciary, or how judicial power itself is historically situated.[57] Such a narrow focus neglects crucial moments of American constitutional development, where constitutional questions were settled either by the political branches or through the interaction of the political branches, the public, and the Court.[58] Constitutional law is only part of the working Constitution. The political branches are also critical here and recognizing this we might try to locate the judicial development of constitutional law within the larger view of the political Constitution. If we turn to the early debates on the nature and meaning of the Constitution, they occur primarily between the executive and the legislature as well as within these branches. Think of the debates over the president's removal power and the establishment of the national bank.[59] These debates touch on central issues of constitutional interpretation and development,

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[56] As Sanford Levinson says, "To reject the ultimate authority of the Supreme Court is not in the least to reject the binding authority of the Constitution, but only to argue that the Court is to be judged by the Constitution itself rather than the other way around." *Constitutional Faith*, 43.

[57] Louis Fisher, *Constitutional Dialogues*, 231-274.

[58] This suggests a deeper point that is often neglected by our focus on the judiciary, and that is the political underpinnings of judicial power. Judicial independence may depend, in one way or another, on the compliance of the other branches. Gerald Rosenberg, "Judicial Independence and Political Power" *Review of Politics* 54: 369-98 (1992).

[59] The repeal of the Judiciary Act of 1801 by the Judiciary Act of 1802 is also a prime example, but one I do not take up for reasons of space.

but in no way center on judicial interpretation and exposition. In these central moments of constitutional development, the judiciary was essentially silent.

These "Madisonian moments" show us a political Constitution that rejects an easy distinction between law and politics that is so central to the claims of judicial supremacy. Whether it is constitutional structure, an institutional clash between the branches of government over constitutional interpretation, or the development of constitutional meaning in non-interpretive ways, the key point is that these devices are political ways of speaking to and maintaining the Constitution. Most importantly, if we conceptualize the Constitution in political terms, we will not see constitutional questions as simply legal questions to be resolved by the judiciary and thus will not share the fears of proponents of judicial supremacy over politics and indeterminacy in regard to the Constitution. In the first instance, the Constitution may be upheld (including rights) by ordinary politics based on its institutional design (as a republican form or government). If constitutional questions are raised (even about the meaning of rights) the various branches speak to these, but there is nothing that makes such debated constitutional questions the sole province of the judiciary. Such questions may be settled by the political branches without ever turning to the judiciary. They may also, in the ordinary course of events, be settled by the courts, but that does not mean they *must* be settled by courts. Indeed, in many instances such questions may remain fundamentally unsettled.

Viewing these early cases of nonjudicial exposition should enable us to glimpse more fully Madison's political Constitution and the way in which

constitutional questions are taken up through the interaction of the constitutional framework—through politics. As Whittington argues, "The jurisprudential model needs to be supplemented with a more explicitly political one that describes a distinct effort to understand and rework the meaning of a received constitutional text."[60] Whittington is focusing on what he calls "constitutional constructions," which develop constitutional meaning in a political rather than a legal fashion. Here, "political" refers primarily to the fact that it is done in a nonlegal setting, even while assuming fidelity to constitutional text. At the same time, constitutional construction is more creative than the narrower and circumscribed notion of judicial interpretation; it is not simply nonjudicial interpretation, but an attempt to construct constitutional meaning from a broad and occasionally unclear text. Constructions are attempts to address questions of constitutional governance, not settle legal issues.

> Unlike jurisprudential interpretation, construction provides for an element of creativity in construing constitutional meaning. Constructions do not pursue a preexisting if deeply hidden meaning in the founding document; rather, they elucidate the text in the interstices of discoverable, interpretive meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules. In such cases, the interpretive task is to limit the possibilities of textual meaning, even as some indeterminacies remain.[61]

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[60] Keith Whittington, *Constitutional Construction,* 5. See also Bruce Peabody, "Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research" *Constitutional Commentary* Vol. 16: 63 (1999).

[61] Whittington, *Constitutional Construction*, 5.

It is tempting to think of Madison's early attempts at constitutional interpretation from the Congress as constitutional constructions.[62] Yet, Whittington at times seems to adhere to a distinction between law and politics that reinforces the judiciary's connection with the Constitution as legal text: the judiciary seems to be the primary enforcer of constitutional boundaries in a negative sense by way of judicial review. By contrast, the political branches advance larger scale constitutional visions by way of the creative task of constitutional construction. So while the political branches advance constitutional development, the judiciary seems to be the guardian of constitutional limits. Perhaps this is how it works out historically.[63] But the line Whittington attempts to draw between constitutional "interpretation" and constitutional "construction" is not always a clear one. This is so at least partly because the line between "law" and "politics" is not always clear when we are speaking to constitutional issues. That is not to say that constitutional politics is not structured by the Constitution; it is, which is the deeper point, but it is done in ways that do not neatly fit the "law" and "politics" distinction. We see this vividly in Bruce Ackerman's work on constitutional change. According to Ackerman, key constitutional developments occur by way of constitutional politics where the people (as *the people*) alter the existing Constitution in favor of a *new* constitution. Ackerman's work moves far beyond the Court and a formal view of constitutional text (Article V) to see how our

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[62] In a somewhat similar vain, Louis Fisher has long spoken of coordinate construction, which, often captures Madison's own thinking. However, I draw on Whittington's notion of constitutional construction in that it seems to fundamentally emphasize the political against a merely legal vision of the Constitution in a way that Fisher does not.

[63] Whittington, "Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning," *Polity* Volume XXXIII, Number 3 Spring 2001.

politics—in extraordinary constitutional moments—shapes and alters our Constitution. Yet even Ackerman returns quickly to a legal view of the Constitution with the judiciary enforcing the (new) Constitution. His "theory relies excessively on judges, for all his examination of the president and the people, to read the meaning of constitutional revolutions and act accordingly. It is judges, in the end, who read the tea leaves of constitutional transformation into the Constitution."[64] Thus constitutional politics is rare and we return to the legal model of the Constitution. Ackerman himself ultimately seems to call for a *legal* settlement of constitutional change by the judiciary. What happens, though, when a constitutional vision is put forward and accepted, but never ratified by the Court? This may happen when a president offers a narrow view of constitutional power, by way of the veto, that is never contested in the Court (as President Jackson did during the bank war). Or, in a similar vein, what happens when constitutional argument persists even after the Court has spoken? Constitutional politics of this sort—persistent contests over abortion rights or federalism, for example—do not easily fit this model. In many cases we have lingering conflicts without a clear and settled legal view of particular constitutional questions (even if we have a multitude of theories that tell us how such issues should be settled, and in fact are settled, by the Constitution if we just read it correctly).

If we recognize the Constitution as a governing framework, the fact that we might have conflicting constitutional visions or unsettled constitutional issues is not necessarily disturbing. The Constitution is a broad and occasionally

[64] George Thomas, "New Deal Originalism," *Polity* Volume XXXII, Number 1 (Fall 2000) 157.

indeterminate text. There are not always "right" answers to constitutional questions, and such issues—often involving "creedal passions"—are naturally going to be the subject of much dispute (and revision).[65] Moreover, the Constitution itself often leaves judgments to the political branches: it calls forth a particular kind of politics as much as it calls for a particular settlement. Thus we should expect that we will have competing constitutional views that change over time: what is taken to be settled at one moment—or not even important—may well be altered at another moment in time. As a framework of governance, our Constitution naturally has its shortcomings—it is imperfect. But this is not going to be overcome by a particular theory of constitutional interpretation perfectly implemented by the Court (or even a decidedly wrong theory of interpretation implemented by the Court to settle the issue). It is when we attempt to treat what is an institutional framework of governance as law that can be coherently settled and reduced to legalities that we run into problems. Alexander and Schauer, for example, insist that to serve its primary mission as law, the Constitution must settle all such question. But this insistence stems from their positing the Constitution as law. And like so much of modern constitutional theory, their preoccupations run the risk of theoretical abstraction. Much of modern constitutional theory, for example, prescribes a particular role for the Court—as the great defender of rights, say—but does so without ever bothering to examine the Court's historical performance in this regard. Constitutional theorizing that is more informed by political science, paying attention to constitutional design and

[65] Samuel Huntington, *American Politics: The Promise of Dis*harmony (Cambridge: Harvard University Press, 1981).

how the system has actually worked, will allow us to better get at these important constitutional questions. As Graber puts it, "rather than ask[ing] . . . 'what should the role of the judiciary be,' the imperfect constitutionalist would want to know' what roles has the judiciary actually played.'"[66] And this applies to the other branches as well. It is not just that so much of constitutional theory is normative, but that it is normative in a way that is utterly divorced from our real-world constitutionalism. Assertions that the judiciary must act as the guardian of the Constitution, otherwise we will be lost, are voiced, in blithe ignorance of how rarely the judiciary has ever saved us from ourselves. And so all too often, constitutional theory treats the judiciary in an idealized world (how it will work in perfect theory), while examining the political branches from a real-world perspective. Constitutional theory is far too preoccupied with its perfect theories of the Constitution and how our Constitution does not measure up to them, rather than with looking at the ways in which our system of constitutional governance actually functions.[67] Let us then turn to examine some Madisonian moments to illustrate the functioning of this system.

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[66] Mark Graber, "Our (Im)Perfect Constitution" *Review of Politics* 51:86, 101 (1989).

The President's Removal Power

In 1789 the First Congress, which of course included many delegates to the Constitutional Convention, debated whether officials in the executive branch—who had been appointed with the advice and consent of the Senate—could be removed by the president alone. Madison argued that the Constitution was not eminently clear on the matter, but that the legislature ought to construe the Constitution in such a way as to give the president the sole power of removal. Madison's conclusion was not simply based on interpreting Article II's vesting clause as requiring this solution. For Madison, the Constitution was not self-evidently clear on this point and it was the task of the Congress to settle such disputes, laying the ground rules for future interpretation and setting a clear precedent so that ordinary politics would not be absorbed by such constitutional questions. Said Madison, "Among other difficulties, the exposition of the Constitution is frequently a copious source [of difficult questions] . . . and must continue so until its meaning on all great points should have been settled by precedents"[68]—in this case the precedents of the Congress. Madison did not see the legislation Congress drafted giving the executive the sole power of removal as

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[67] Christopher Eisgruber, *Constitutional Self-Government* (Cambridge: Harvard University Press, 2001). Eisgruber, for example, begins with the notion that our Constitution is a framework of governance, but then very quickly argues that judges *should* interpret the Constitution based *on their notions of justice* (with very little concern about how this has actually worked out historically). Normative concerns are deeply important and are a fundamental part of constitutional theory. Still, such normative concerns can take into account our constitutional history. See, Hadley Arkes, *Beyond the Constitution* (Princeton: Princeton University Press, 1990); Sotirios Barber, *The Constitution of Judicial Power* (Baltimore: Johns Hopkins University Press, 1993); and Stephen Macedo, *Liberal Virtues* (New York: Oxford University Press, 1990). Whereas leading legal thinkers like Ronald Dworkin, *Freedom's Law* (Cambridge: Harvard University Press, 1996) rarely connect their thinking with our constitutional history.

merely advisory, but rather sought to settle a constitutional dispute—and settle it by way of legislative construction of the Constitution. William Smith of South Carolina objected to this construction, insisting that the consent of the Senate was necessary to remove an appointee as it was necessary to appoint him in the first place. In drawing out his argument, Smith pointed to *Federalist 77*, where none other than Alexander Hamilton, Madison's great collaborator as Publius, argued that the Senate was necessary "to displace as well as appoint." Smith then pushed his argument a step further in insisting that the Congress—particularly the House—had no business in deciding the matter. Given that constitutional meaning was in doubt, Smith suggested that this was preeminently a judicial question. Rather than illegitimately attempting to expound on the Constitution, Smith thought the Congress should wait until the question came before the judiciary to be settled.[69]

Madison insisted that the judiciary was not, nor could it have been meant to be, the primary expositor of the Constitution. "But the great objection drawn from the source to which the last arguments would lead us is, that the Legislature itself has not right to expound the constitution; that whenever its meaning is doubtful, you must leave it to take its course, until the Judiciary is called upon to declare its meaning."[70] For Madison, the Congress had as much right to determine

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[68] Madison to Thomas Jefferson, June 30th 1789 in William T. Hutchinson, William M. E. Rachal, and Robert Rutland, eds., *The Papers of James Madison* (Chicago: University of Chicago Press, 1962) XII, 290-291. See also Rakove, *Original Meanings*, 349.

[69] Gary Jacobsohn notes that the consensus in Congress—unlike Madison's argument—did not question "the finality of the judicial determination of constitutionality," although that is not quite the same things as endorsing it. *The Supreme Court and the Decline of Constitutional Aspiration*, 123.

[70] *Annals of the First Congress I*, 519-521 (June 17, 1789).

constitutional meaning as the judiciary; indeed, he doubted whether "this question could even come before the judges."[71] Madison's argument here is often taken as the great defense of departmentalism in constitutional interpretation.[72] This may be so, but we must be clear on what we mean by departmentalism. In some guises departmentalism is taken to mean that each department is the primary interpreter of *its* constitutional power; that is, it interprets those provisions of the Constitution that apply to it specifically.[73] In this instance, the Court is not the final authority on Congress' power, although it may well be on issues addressing the judiciary. But this is clearly not Madison's argument here. Instead, Madison insists that the Congress (or any branch) can touch upon constitutional questions. As the Constitution is the governing framework over all the branches and the branches themselves are structured in part to maintain the Constitution, they all may speak to the Constitution; indeed, the idea is that they are bound by the Constitution and being so bound are obligated to it and not to the other branches. In fact, Madison's view seems to suggest that "interpretive plurality" is central to maintaining the Constitution. If such a task were vested in a single body, the

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[71] Ibid. See also Rakove, *Original Meanings*, 348.

[72] Louis Fisher, *Constitutional Dialogues*, 231-279. Agresto's departmentalism seems to be more along these lines as well, insofar as he puts emphasis on the dynamic of the checks and balances and interaction between the branches, *The Supreme Court and Constitutional Democracy*, 99-102. Gary Jacobsohn suggests that Lincoln's views on judicial review, properly understood, also put it in this light. *The Supreme Court and the Decline of Constitutional Aspiration*, 95-112.

[73] See Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence: University Press of Kansas, 1989) for one such view. Also, Charles Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996). Hobson suggests that Marshall's "defense of judicial review fully agreed with the "departmental" theory of constitutional interpretation, according to which each of the three co-ordinate departments of government had final authority to interpret the Constitution when acting within its own sphere of duties and responsibilities," 67. Although, Corwin, who coined the term, surely meant "coordinate construction."

chances of error and misgovernment would be far higher. By vesting this task in multiple institutions, the Constitution is more likely to be adhered to and we are more likely to get it right. As Madison argued, "But, I beg to know, upon what principle it can be contended, that any one department draws from the constitution greater powers than another, in making out the limits of the powers *of the several departments*?" And again, "If the constitutional boundary of either be brought into question, I do not see that any one of these departments has more right than another to declare their sentiments on that point."[74] We should even note that in this case Congress is largely defining *executive* power.

For Madison the Court had no special relation to the Constitution, which goes some way to showing us that he did not see the Constitution as "law" to be enforced mostly by the courts. Madison fully recognized that the Constitution would contain ambiguity and indeterminacy, but that did not mean the Court alone should give clarity and final meaning to the Constitution over the other branches.[75] Instead, Madison thought that Congress' construction would be preferable in this matter. His argument is a reminder that the Constitution is not only about limitations, but also about constitutional power and creating a workable government. He thought the legislature would be the best place to come up with a workable solution to this constitutional question, drawing on its experience to craft a competent solution to an immediate problem. This also shows us that Congress may speak to constitutional meaning in ways that do not accept the dichotomy between "law" and "politics" or between "interpretation"

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[74] *Annals of the First Congress I*, 519-521 (June 17, 1789) my emphasis.

and "construction," even while taking fidelity to the Constitution very seriously. Madison brought this to bear in the "Decision of 1789": if Congress' construction of the Constitution "is the true construction of this instrument, the clause in the bill is nothing more than explanatory of the meaning of the Constitution, and therefore not liable to any particular objection on that account." Here Madison seems to be speaking distinctly of congressional *interpretation* as clarification and insisting that Congress' interpretation ought to stand—not because it is Congress' interpretation, but because it is the correct interpretation. If, on the other hand, the Constitution "is undecided as to the body which is to exercise it [the power of removal], it is likely that it is submitted to the discretion of the Legislature, and the question will depend on its own merits."[76] This sounds much more like Whittington's construction, which Madison is saying depends on the political judgment of Congress to create a constitutional settlement. Either way, for Madison Congress' construction of the Constitution should settle the matter and guide future questions of constitutional meaning on this point.[77] Thus, constitutional politics from the Madisonian perspective should settle constitutional meaning, giving us precedents that would guide even the judiciary. While this is a political solution, it is one that attempts to fit within the constitutional framework. Madison's solution lays forth a prudent and practical

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[75] See Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation."

[76] *The Annals of the First Congress* I, 1789-1791, 464, 461.

course of constitutional governance, but one that squares with Article II concerns and thus is rooted in a larger constitutional vision. But what is so important is not just reducing the Constitution to a particular meaning—by construction or interpretation—and passing that along; it is the framework the constitutional text calls forth. The framework character of the Constitution, holding out the possibility of disputes between the branches, moves us to focus on the persuasiveness (and even political viability) of answers to constitutional questions rather than acceptance of the answers imposed by a single branch—especially given the chance that a single branch could get it wrong or come up with an unworkable solution.

The Bank of the United States

We see a reliance on nonjudicial precedent and settled meaning from Madison as President when he signed the Second Bank of the United States into law in 1816. Madison, of course, had argued against the establishment of the First Bank of the United States in the First Congress. In this great debate over the nature of the Constitution and how to properly interpret it, Madison joined with Thomas Jefferson against his one-time ally Alexander Hamilton.[78] From

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[77] When the Court later addressed the President's removal power, Chief Justice Taft turned to Madison's arguments in the House. *Myers v. United States,* 272 U.S. 52 (1926). This power was qualified in later Court decisions regarding the President's power to remove officers performing quasi-legislative and quasi-judicial duties, *Wiener v. United States*, 357 U.S. 349 (1958) and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). See also Fisher, *Constitutional Dialogue*, 238 and Dean Alfange, "Separation of Powers: A Welcome Return to Normalcy?" 58 *The George Washington Law Review* 668 (1990).

[78] "But the proposed bank could not even be called necessary to the government; at most it cold be but convenient." James Madison, "The Bank Bill, House of Representatives 2 Feb. 1791," in Philip Kurland and Ralph Lerner, eds., *The Founder's Constitution,* Volume Three (Indianapolis: Liberty Fund, 1987) 245. And "A bank there is not necessary, and consequently not authorized by this phrase." Thomas Jefferson, "Opinion on the Constitutionality of the Bill for Establishing a National Bank, 15 Feb. 1791," 246.

Congress, Madison argued that the Constitution did not grant the national government the power of incorporation and, therefore, the government could not incorporate a national bank. Jefferson echoed this argument from the executive branch as Secretary of State. Hamilton, also from the executive branch as Secretary of the Treasury, insisted that the national government, relying on the "necessary and proper clause," had the power.[79] While the debate over constitutional interpretation is fascinating in and of itself, it is not our primary concern. For our purposes, the compelling point is that a coordinate constitutional construction between the executive and legislative branches settled constitutional meaning on this issue (at least for a time). Madison's and Jefferson's arguments are interesting in that they show us members of Congress and the executive articulating constitutional meaning in a way that limits their power. This negative function—a saying "no" to governmental power by drawing on the Constitution—is not just a judicial function. But there is an even more revealing point, which is altogether neglected by the proponents of judicial supremacy. To really understand the constitutional framework, we must view the branches of government in relation to one another and examine what each is doing at a particular moment. As the Court is essentially a reactive institution, its role depends upon the actions of the executive and legislature, suggesting variation across time, forcing our thinking about any particular institution to be contextually sensitive. If the Court, for example, has a broader vision of constitutional permissiveness than the Congress or the president, then it will

[79] Alexander Hamilton, "Opinion on the Constitutionality of the Bank, 23 Feb. 1791" in Kurland and Lerner, *The Founder's Constitution,* 247-250.

rarely—if ever—be positioned to strike down acts of Congress as unconstitutional. Conversely, if we have a truly activist Congress and president with a broader view of their power than the Court has, then we are likely to see a much more active Court.[80] Even the terms "activism" and "restraint" must be seen in relation to the specific actions of the political branches. Thus, the Court may be a defender of constitutional limits and rights at a particular time, given a particular Congress and president, but it may not be at a later time. These are empirical questions, not simply questions of theory and logic.

Against Madison's and Jefferson's objections, the First Congress established the bank and it was signed into law by President Washington. This alone, however, was not enough to settle the issue; in fact, the constitutional issue was only settled over a period of decades.[81] Indeed, this construction, Madison later said,

> had undergone ample discussions in its passage through the several branches of the Government. It had carried into execution throughout a period of twenty years with annual legislative recognition . . . and with the entire acquiescence of all the local authorities, as well as of the nation at large; to all of which may be added, a decreasing prospect of any change in the public opinion adverse to the constitutionality of such an institution.[82]

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[80] Mark Graber, "The Jacksonian Origins of Chase Court Activism" *Journal of Supreme Court History* Vol. 25 No. 2 (2000) 18-19.

[81] Gerard Magliocca, "Veto! The Jacksonian Revolution in Constitutional Law" *University of Nebraska Law Review* 78: 205-262 (1999).

[82] Madison quoted in Gary Rosen, *American Compact: James Madison and the Problem of Founding* (Lawrence: University Press of Kansas, 1998) 172. See also, Charles Warren, *The Supreme Court in United States History, 1789-1835* (Boston: Little, Brown, and Company, 1922, 1926) 517-518, for Madison's criticism of Marshall's *McCulloch* opinion.

Today we turn to Marshall's decision in *McCulloch v. Maryland* as settling this question; we take a constitutional dispute to be settled only if the Court has addressed it.[83] In an interesting way, though, the question of whether the national government could charter a bank was settled and was taken to be settled by the time it came before Marshall and the Court. As Marshall himself recognized in his opinion, "It has truly been said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation."[84] It would have been wholly shocking if Marshall had decided the case other than he did, given the constitutional politics that had

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[83] In discussing *McCulloch*, perhaps the leading constitutional law book, Gerald Gunther and Kathleen Sullivan, *Constitutional Law* (New York: Foundation Press, 1997) thirteenth edition, gives a history of the debate prior to *McCulloch* and speaks of scholarly debate since *McCulloch*, but does not speak of Jackson's veto and the effective settlement of the issue for several decades seemingly against Marshall's opinion. Gunther and Sullivan acknowledge that "the McCulloch decision, important as it is, was no more the end than the beginning of the debate." Yet, they are speaking of the national legislature's ability to reach local affairs and not the power to establish a bank, 99. Two leading books by political scientists fare no better. David O'Brien's *Constitutional Law and Politics* (New York: W.W. Norton, 1998) fourth edition, gives a similar history and suggests that Marshall's interpretation seems correct and has been confirmed by subsequent Court opinions—namely, *The Legal Tender Cases* (1884) and *Katzenbach v. Morgan* (1996). But this (1.) eclipses a large portion of our constitutional history (1819-1884) and (2.) focuses again on the Court missing how the other branches seem to have settled a vital constitutional questions without turning to the Court. Lee Epstein and Thomas Walker's *Constitutional Law* (Washington, D.C.: CQ Press, 1998) fourth edition, gives a history of the conflict prior to Marshall's opinion but says nothing of what came after 1819. This from two leading empirical political scientists! Murphy, Barber and Fleming, *American Constitutional Interpretation*, give a history of the conflict and Jackson's statement rejecting Marshall's opinion. But then this book specifically seeks to give an alternate view of the constitution and questions of constitutional interpretation, rejecting much of conventional understanding.

[84] *McCulloch v. Maryland* 4 Wheat. (17 U.S.) 316, 401 (1819).

already addressed the question (and given his own inclinations).[85] What is interesting about Marshall's opinion for us is its claim to judicial supremacy. Marshall insisted that "the constitution of our country, in its most interesting and vital parts, is to be considered."[86] And then continued, "But [the question] must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty."[87] From our vantage point, we take Marshall at his word. But subsequent history belies Marshall's argument. The Court's opinion did not cease constitutional argument on the question. Just over a decade later, the debate was rejoined when President Jackson rejected Marshall's *McCulloch* opinion and insisted the bank was not constitutional. Presidents Van Buren and Polk, "articulated" Jackson's constitutional "reconstruction,"[88] with President Tyler specifically vetoing--on multiple occasions--a new bank on similar grounds. The constitutional issue was settled for a large portion of the nineteenth century *against* the bank, even if *McCulloch* was never overturned (allowing it to be resurrected by twentieth-century constitutional law while ignoring our actual constitutional history). "[President] Tyler's vetoes prevented the dismantling of Jacksonian Democracy's major political achievements. Those same vetoes, however, blocked a case

[85] At least on the question of whether the national government could establish a bank. Whether or not a state may tax that bank once established was an open question.

[86] McCulloch at 400-401.

[87] *Ibid.*

challenging the bank's constitutionality from reaching a Supreme Court packed with Jackson's anti-bank partisans. Thus, Tyler may have inadvertently saved *McCulloch* from the dustbin of history and denied Jackson's movement what would have been its greatest victory."[89] The point is that constitutional meaning may be settled over time, particularly with important constitutional questions, and in ways that cannot be divorced from politics. Such settlements themselves are likely to depend upon the political forces of the day, suggesting that a particular constitutional vision—with its settled meaning—may only be as stable as the political forces which support it, leaving open the possibility that there is no such thing as "authoritative settlement" in the long run—whether judicial or otherwise.[90] Nor does the judiciary seem institutionally capable of resolving such issues by mere proclamation. To insist, as Alexander and Schauer do, that constitutional meaning, once settled, should not be revisited is to place a higher value on absolute clarity than the "true" meaning of the Constitution (if we get it wrong), as well as to ignore how the constitutional framework establishes a workable system of government which will almost certainly mean that particular constitutional settlements will be reopened.

These early debates on constitutional meaning are notable, particularly to our modern tastes, in that the judiciary plays such an insignificant role in them.

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[88] Skowronek, *The Politics Presidents Make*. Also, Whittington, "Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning."

[89] Magliocca, "Veto!," 212. See also Mark Graber, "The Jacksonian Origins of Chase Court Activism."

[90] As Scott Gant's defense of judicial supremacy recognizes. Gant qualifies his version of judicial supremacy saying that, well, nothing is final. Yes, but if that is so, then why do we really need authoritative judicial settlement? If constitutional questions can be reopened by the other branches or by the public, then why close them by the judiciary?

Here we have the great early debates about constitutional exposition and governance, absent (mostly) the great expositor of the Constitution—the judiciary. Yet, Madison's political Constitution does not reject judicial interpretation of the Constitution, it only rejects the notion that the Court is the final interpreter of the Constitution in an authoritative way.[91] Still, Madison did worry that judicial interpretation might inexorably lead to judicial supremacy. In an oft quoted letter to John Brown, he made evident this concern:

> In the State Constitutions and indeed in the Fed[eral] one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making ye decision, it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Dep[ar]t[ment] paramount in fact to the Legislature, which was never intended and can never be proper.[92]

For Madison constitutional meaning would be settled across time by the political interplay between the branches, an activity that would also maintain the limits of the Constitution. Moreover, for Madison "this essentially creative task

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[91] While judicial review might seem to flow ineluctably from the very notion of checks and balances, Madison does not discuss it in those terms. In his classic exegesis of checks and balances in *Federalist 51* which I discussed above, Madison never even mentions the judiciary. In fact, in that very discussion Madison rejects a means similar to judicial review. One notable solution to keeping the majority in check, Madison says, is to create "a will in the community independent of the majority—that is, of the society itself." The Court, as an unelected and undemocratic branch of government, that great "countermajoritarian" institution, seems suspiciously independent of society, a solution unacceptable to Madison. It can scarcely be doubted that Madison was genuinely perplexed by the notion of judicial review. Other than Hamilton's *Federalist 78*, perhaps the most prominent reference is in *Federalist 16,* also by Alexander Hamilton, "If the judges were not embarked in a conspiracy with the legislature, they would pronounce the resolution of such a majority to be contrary to the supreme law of the land, unconstitutional, and void." *The Federalist Papers*, 85.

[92] Madison to John Brown, October 12, 1788, "Observations on the 'Draught of a Constitution for Virginia,'" Murphy et. al., *American Constitutional Interpretation*, 279. Madison's argument must also be separated from arguments for legislative supremacy, the type that John Bannister Gibson made in *Eakin v. Raub*. Legislative supremacy, too, was unacceptable.

does not expose a failing in the constitutional design; it represents a working constitutional system."[93] Madison's system brought forth mutual interaction between the different bodies to construct and settle constitutional meaning, while no one branch was peculiarly suited to the task or supreme in terms of a final say on the Constitution. Intimately connected with this point is Madison's view that the system would work in a political rather than narrowly legalistic manner. It is not simply that the legislature and the executive might rely on prudence as well as principle in construing the Constitution, but that the very dynamic between them lends the system a political nature, which makes any easy distinction between constitutional law and constitutional politics rather tenuous. In the absence of judicial review, though, it is difficult to see how the Court would play much of a role here.[94]

We may best keep judicial review and judicial supremacy distinct from one another by placing judicial review within the constitutional framework I sketched above. This key distinction between judicial review and judicial supremacy gets conceptually blurred, however. The crucial step occurs in thinking of the Constitution as law akin to ordinary law; it is this transformation that yields us judicial supremacy. Here I will take up the crucial link between judicial supremacy and the legal Constitution.

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[93] Whittington, *Constitutional Construction,* 1.

[94] While Madison himself is conspicuously silent on the matter, the very logic of checks and balances gives rise to the notion of judicial review, which lends at least some credence to the notion of the Court as the primary enforcer of our Constitution. To add to the confusion, Madison himself gave light to this view during the debate over the Bill of Rights, saying the courts would act as a bulwark against the executive and legislative branches in preserving the peoples' rights Stephen Macedo, *The New Right v. The Constitution* (Cato, 1986), 24. Especially, Barry Friedman, "Dialogue and Judicial Review" 91 *University of Michigan Law Review* 4: 577-682 (1993).

In their defense of judicial supremacy, Alexander and Schauer argue that "if a multiplicity of bodies says what the law is, then there is likely to be a multiplicity of laws, or, more precisely, a multiplicity of interpretations of the same law. And if . . . knowing what the law is and knowing how to comply are necessary conditions to legality itself, then multifarious law and multifarious interpretation are at odds with the rule of law itself."[95] Hence, the Constitution's meaning must be settled by a single body. In making this argument Alexander and Schauer turn, not surprisingly, to *Marbury*. The Court itself, in making similar assertions, has also turned to Marshall's opinion. As Justice Kennedy most recently put it:

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.[96]

The Legal Constitution

Marshall's opinion is cited by those invoking judicial supremacy because he was the first and greatest articulator of their central premise: the Constitution is law. It is this assertion that is key to any notion of judicial supremacy. And while proponents of judicial supremacy also turn to the separation of powers—as Alexander and Schauer, Justice Kennedy, and even Marshall do—the argument

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[95] Alexander and Schauer, "Defending Judicial Supremacy: A Reply" *Constitutional Commentary* Vol. 17: 455-482 (2000), 482.

[96] *City of Boerne v. Flores* at 535-536. See also, *Cooper v, Aaron* 358 U.S. 1 (1958).

there, too, depends on the notion that the Constitution is law. Conceptualizing the Constitution as law leads to the insistence upon judicial supremacy and skepticism of nonjudicial interpretation; it is this view of the Constitution that leads us to a Court-centered focus on constitutional law at the expense our historical constitutional development.

Edward Corwin insisted, along these lines, that judicial review rested on three propositions, and added that it "can rest upon no others."

> 1—That the Constitution binds the organs of government; 2—That it is law in the sense of being known to and enforceable by the courts; 3—That the function of interpreting the standing law appertains to the courts alone, so that their interpretation of the Constitution as part and parcel of such standing law are alone authoritative, while those of the other departments are mere expressions of opinion.[97]

Corwin's formulation, as we will see, bears a striking resemblance to Marshall's own syllogistic reasoning in *Marbury*. Corwin further noted, though, what Marshall did not: the third proposition is not readily apparent, or even accepted. In fact, the third proposition suggests that judicial review and judicial supremacy must go together, a point Marshall seems to hint at, but does not lay down explicitly in *Marbury* (although he says as much in *McCulloch*). Corwin himself suggested that the second proposition "needs to be shown," although it is "registered in the Constitution itself."[98] Although this, too, can be questioned.

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[97] Edward Corwin, "*Marbury v. Madison* and the Doctrine of Judicial Review," 103 and *Court Over Constitution*, discussing *Federalist 78* in this regard, 8.

[98] Ibid. 103.

Judge Gibson certainly rejected both the second[99] and third propositions and thus rejected judicial review, even if his followers like James Bradley Thayer would limit review to the "clear mistake" rule and thus plea for judicial restraint.[100] Madison certainly rejected proposition 3, while at times accepting proposition 2. We might add names to the list of those rejecting propositions 2 and 3 *ad infinitum*, but the point is that the third proposition only makes sense if one assumes the Constitution is law in the ordinary and not the political sense of that word, which proposition 2 also hints at (although it may be qualified). Thus, Corwin's proposition 2 could cut both ways: read one way, it may fit judicial review into the Madisonian separation of powers; read another, it blends with proposition 3 and gives us judicial supremacy. In this, it replicates Marshall's very opinion in *Marbury*.

If the "what of the Constitution" is law, then the "who of interpretation" is the Court. By beginning from the premise that the Constitution is law, the proponents of judicial supremacy insist that it is the province of the judiciary to say what the law is—making constitutional interpretation a judicial function and the Court the primary enforcer of the Constitution; indeed, interpretation itself becomes a legal enterprise.[101] Proponents of judicial supremacy demand that the Constitution's meaning be clear, conclusively settled, and binding on all. If the Court is the interpreter of law, it is given an exclusive link to the Constitution,

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[99] Gibson does accept judicial review of state laws when they conflict with federal law, but only because the power is clearly derived from Article VI of the Constitution.

[100] See also on Thayer, Barber, *The Constitution of Judicial Power*, 78-91.

[101] Harris, *The Interpretable Constitution*, 20.

leading to an insistence that the Court's interpretation of the Constitution must, of necessity, bind the other branches of government, settling the law.

The insistence on the legal Constitution is the central development in Marshall's thinking.[102] From this judicial review ineluctably follows and even, if pushed, judicial supremacy. Let me draw on Alexander Bickel to restate this development. A constitution is a law aimed at binding the government itself and, as such, the "constitution is a paramount law" to which "ordinary legislative acts must conform."[103] True enough. But, as Bickel noted, the real question is who is "empowered to decide that the act is repugnant [to the Constitution]."[104] In addressing this question, Marshall mustered his considerable skills of deductive logic to insist that it was the judiciary. While Marshall does not wholly rule out

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[102] Now, we might readily add, even eagerly concede, that Marshall was often driven by the political context of his opinions and that this is as much the case in *Marbury* as any where else. And even if Marshall's opinion does not establish—in the here and now of 1803—the power of judicial review, even if Marshall himself wields the power with great political astuteness, and even if Marshall did not explicitly insist upon judicial supremacy in *Marbury*, the logic of Marshall's argument clearly articulates the legal Constitution which makes the argument for judicial supremacy possible. It may well be that the modern doctrine of judicial review (and its merger with judicial supremacy) was not fully developed until the latter half of the nineteenth century, but its logic is articulated by Marshall in *Marbury*. Marshall gives us the legal Constitution and thus clears a path for the emergence of constitutional law as we know it today. This is perhaps his greatest significance. His opinions that expounded on the Constitution from the bench give rise to constitutional law, making him, in the words of his most recent biographer, "the definer of a nation." See especially Mark Graber's articles on the Marshall Court. "The Passive Aggressive Virtues: *Cohens v. Virginia* and the Problematic Establishment of Judicial Power" *Constitutional Commentary* 12: 67-92 (1995); "Establishing Judicial Review: *Schooner Peggy* and the Early Marshall Court," *Political Research Quarterly* 51: 7-25 (1998); "Federalists or Friends of Adams: The Marshall Court and Party Politics," *Studies in American Political Development* (1999); "The Problematic Establishment of Judicial Review" in Howard Gillman and Cornell Clayton, eds., *The Supreme Court in American Politics: New Institutionalist Interpretations* (Lawrence: University Press of Kansas: 1999).

[103] Alexander Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press, 1962) 3.

[104] Ibid.

that the other branches can reach such questions, or that they must adhere to the Court's reading, his logic tends in that direction. [105]

Marshall's formulation begins with the writtenness of the Constitution: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."[106] So far so good. Marshall then begins his move that makes the Constitution come before the Court, so to speak, and, in doing so, gives the Court the power to say what the Constitution means. "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?"[107] To which Marshall—no surprise—says this cannot be. From here he proposes to give the question "attentive consideration."[108] It is precisely at this point that Marshall compares the Constitution to ordinary law. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expand and interpret that rule. If two laws

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[105] Clinton, Marbury v. Madison; Christopher Wolfe, *The Rise of Modern Judicial Review* (New York: Basic Books, 1986) 80-84; and Hobson, *The Great Chief Justice*, all insist that Marshall's opinion is much narrower than it has been made out to be by twentieth century proponents of judicial activism. For them Marshall was simply claiming the right to interpret the judicial power and not to authoritatively settle the meaning of the Constitution for the other branches. A number of other scholars reject this specific reading of *Marbury*, yet insist that Marshall did not claim that the Court was necessarily the sole and authoritative settler of constitutional meaning. See Hadley Arkes, *Beyond the Constitution*; Harris, *The Interpretable Constitution*; Barber, *The Constitution of Judicial Power*.

[106] *Marbury* at 177.

[107] Ibid.

[108] Ibid.

conflict with each other, the courts must decide on the operation of each."[109] That is, the court must determine which conflicting rule governs the case: the law or the Constitution. This, Marshall tells us, is "the very essence of judicial duty."[110] And rather obviously, if we follow Marshall's formulation, the Court must prefer the Constitution—supreme law—to an ordinary act of the legislature. If it were otherwise, the Constitution itself would be an absurd attempt to limit a power that is illimitable; "it would give the legislature a practical and real omnipotence."[111]

Marshall's argument moves so swiftly to its conclusion and seems so intuitively correct that we are likely to agree with him unless we stop to question his beginning point. That is, that the Constitution is akin to ordinary law. By doing this, Marshall claims that the Court is the (authoritative) interpreter of the (legal) Constitution.[112] As Marshall himself frames it: (1) It is the Court's duty to say what the law is; (2) The Constitution is law; (3) Therefore, it is the Court's duty to say what the Constitution means. For Marshall's argument to work, the Constitution must be viewed in legal and not political terms. This has led Sylvia

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[109] *Marbury* at 178.

[110] Ibid.

[111] Ibid.

Snowiss to venture that "Marshall transformed explicit fundamental law, different in kind from ordinary law, into supreme ordinary law, different only in degree."[113] Thinking of the Constitution as law, then, leads us to draw a neat distinction between "law" and "politics," which, perhaps not tenably, makes us skeptical of politics—and the so-called political branches—in regard to the Constitution. If the language of the Constitution is the language of law, then the Constitution becomes the special province of those tutored in the law and constitutional grammar becomes a technical legal grammar. "The establishment of judicial review added the law-politics distinction to the conceptual foundation of American constitutionalism. This distinction was the justification for the court's authority to define the limits to government."[114] It is in this way that Marshall's legalist formulation lends serious support to judicial supremacy and even draws on the very Madisonian separation of powers to do so.

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[112] It was just this premise that Judge Gibson refused to grant Marshall in *Eakin v. Raub*, saying in effect that the Constitution does not come before the Court. I have said that Gibson disputed the second premise of Marshall's syllogism. To flesh this out let us view Marshall's syllogism: Major premise: "It is the very essence of judicial duty" to decide between conflicting laws. Minor premise: A conflict between a law and the Constitution is simply a particular variety of a conflict between laws. Marshall's conclusion: It is the essence of judicial duty to decide on a conflict between the law and the Constitution. This, of course, inevitably required the judiciary to expound upon the Constitution. Marshall's argument is such that it rests upon the premise of a written constitution and nothing in particular within that constitution; it is a purely logical argument and it was on a point of logic that Gibson disputed Marshall's reasoning. Gibson insisted that the Constitution, properly speaking, is not like ordinary law and, thus, brought Marshall's neat syllogism crashing down. But all of this has been ably argued elsewhere. See Dean Alfange Jr., "*Marbury v. Madison*: In Defense of Traditional Wisdom" *Supreme Court Review* 1993 (Chicago: University of Chicago Press, 1994) 413-444 and Robert Faulkner, *The Jurisprudence of John Marshall* (Princeton: Princeton University Press, 1968) 203-212.

[113] Snowiss, "From Fundamental Law to Supreme Law of the Land," 5.

[114] Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (Chicago: University of Chicago Press, 1990) 189.

Law, Politics, and the Separation of Powers

The distinction between law and politics is at the heart of *Marbury* and claims to judicial supremacy. And as it is the judiciary that gets to draw this distinction between law and politics, it may thereby "rule the political branches by defining the outlines of their duties," making it, in essence, first in "dignity and authority"[115] so far as the Constitution is concerned. While Marshall plays up the Constitution's legal nature—and, from there, judicial authority on legal questions—he does leave a space for political questions that are beyond the reach of the judiciary. In doing this, Marshall gives breathing space to Madison's more overtly political Constitution. In the famous "political questions" passage, Marshall insists, "the province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[116] This applies to the legislature as well:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution . . . it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative grounds. This court disclaims all pretensions to such a power.[117]

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[115] Faulkner, *The Jurisprudence of John Marshall*, 200. Also, Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism.*

[116] *Marbury* at 170.

[117] *McCulloch* at 423.

Questions of constitutional power are questions of law and are properly before the Court; questions of how that power should be exercised (questions of politics) are left to the political branches. Insofar as the Constitution has a political and non-legal realm, Marshall seems to see the free interplay of the branches (executive and legislative, at least) as determinative of constitutional propriety.

At first glance judicial review intuitively coincides with this system of checks and balances: it is the judiciary's check on the legislative and executive branches. This may well go with the constitutional framework. But it does not go as easily with Marshall's legal Constitution (even as it makes a nod to political exceptions). The very notion of checks and balances seems to give rise to the notion of judicial review. But the more famous arguments for judicial review, the ones that we have digested over the years from Hamilton and Marshall, do not see judicial review as one check in the midst of many. They see it as *the check that maintains the Constitution* because they see the Constitution as law.

Following the general analysis of *The Federalist Papers*, we might note that those dealing with the judiciary (numbers 78 to 83) "do not quite fit into the whole." Rather, the treatment of the judiciary "stands somewhat apart from the rest of the book, just as the judiciary stands somewhat apart from politics."[118] *The Federalist Papers*, as we have seen, rarely refers to the Constitution's legal status and insists upon its institutional arrangements as maintaining its primacy. And yet Hamilton's discussion of the judiciary in the last few *Federalist Papers*, published, incidentally, in the second bound volume and not in the newspapers,

[118] James Stoner, *Common Law and Liberal Theory* (Lawrence: University Press of Kansas, 1996) 197, second passage quoting David Epstein.

treats the Constitution as primarily a parchment barrier, as so much law, with the judiciary enforcing the parchment. Let us see Hamilton's famous formulation:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[119]

The Constitution controls, but, to borrow Charles Evans Hughes' phrase, the Constitution is what the Court says it is; or at least the Court gets to say what the law is, and, if the Constitution is law, as Hamilton says, then the Court gets to say what the Constitution means. It is the Court's "proper and peculiar province" to do just this. Hamilton is quick to hedge this, suggesting that the judiciary has "neither FORCE or WILL but merely judgment." Still, the judiciary is, in Hamilton's formulation, "the faithful guardian of the Constitution."[120] Whereas in the earlier *Federalist Papers* the political dynamic of the Constitution was emphasized, when the judiciary is discussed the Constitution is seen in legal terms. Even if the Court may be checked by the other branches—and notably Hamilton does not set it up in these terms—the Court seems to be the final interpreter of constitutional meaning. In this regard, the Court's check against legislative and executive invasions becomes an instrument that enables it to take up primary responsibility for constitutional interpretation. Thus, questions of

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[119] *The Federalist Papers,* No. 78, 435.

[120] *The Federalist Papers,* No. 78, 433, 438.

constitutional meaning, in most cases, become legal questions, resolvable only by the judiciary: constitutional meaning becomes coterminous with constitutional law.[121] In Hamilton's and Marshall's readings, the Court becomes the primary enforcer of written constitutional limits; the Court makes the Constitution binding on the government.

At the same time, both Hamilton's and Marshall's legalist arguments draw on another aspect of the separation of powers that gives weight to the peculiar relationship between the judiciary and the Constitution—at least if we insist upon its legality, as they do. While the separation of powers brings to mind checks on governmental power, as we noted earlier, it also was instituted for effective governance: each branch was institutionally designed to meet the peculiar nature of its task.[122] *The Federalist Papers*, for example, speaks of a unitary executive designed to meet the needs of executive duties and a plural and bicameral legislature to foster democratic deliberation.[123] Hamilton also draws this point out in speaking of the institutional design of the judiciary—namely its independence and learning in the law—pointing to its particular task within the operation of the government. This is not to say that powers are rigidly separated between the branches, so that all "executive" power must be delegated to the executive. In

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[121] "The national courts thus not only judge under the laws but magisterially preside over them." Faulkner, *The Jurisprudence of John Marshall*, 201.

[122] See especially, Fisher, *Constitutional Dialogues*.

[123] As Hamilton argues in *Federalist 70*, "Those politicians and statesman who have been the most celebrated for the soundness of their principles and for the justness of their views have declared in favor of a single executive and a numerous legislature. They have, with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable in a single hand; while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests," *The Federalist Papers*, 392. See also Nos. 57 and 71.

giving us "checks and balances," the Constitution clearly did not embrace such a rigid rule of separation.[124] But I have already spoken extensively on checks and balances in this regard. Here I wish to emphasize the power of separation. If checks and balances make the government safe, separation of powers helps to make it competent.[125] Like the other branches, the judiciary is constructed in such a way as to call forth those virtues required to the art of judging, as Hamilton describes them. Judges, unlike all other high offices, serve by appointment and during good behavior, insuring their independence, so as to enable them better to perform their peculiar task. For Hamilton this means men of a particular character and learning; it is a small number of men "who unite the requisite integrity with the requisite knowledge"[126] to sit on the bench. Based on their learning in the law and their subtlety of mind, on their reasoning spirit and independence form political pressure, judges may justly claim to be uniquely suited to the task of constitutional exposition. If the Constitution is law, by training and by institutional design the judiciary is uniquely positioned to lay down the intricacies of constitutional meaning and stick to such interpretations. Moreover, we might say that it is their task alone, as the other branches, constituted as they are, are not suitable for such delicate work. Thus, in "construing the Constitution, the judge performs a political duty through the

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[124] Dean Alfange, Jr., "The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?"

[125] Jessica Korn, *The Power of Separation*, 19.

[126] *The Federalist Papers*, No. 78 at 439. Although, as Dahl says, the Court is itself a political institution and justices are often chosen for their politics. ""Decision-Making in a Democracy," 285.

exercise of a technical duty."[127] The result of this is to draw the Court closer to the Constitution than the other branches.

> When the separate judicial establishment performs its distinct function and when it serves as a complicating element in the system of checks and balances, the judiciary is but one of the three branches of the government and as such is unexceptionable. But at still another level—transcending its other functions, and implied in the technical knowledge needed by this branch of government alone—the judiciary acts as special guardian of the principles of the Constitution.[128]

Marshall himself relies heavily on the legal nature of the question in *Marbury* to justify the judiciary's authority in resolving the dispute. Marshall insists, again and again, that whether Marbury is entitled to his appointment is a question for the judiciary alone, as it is a question of law: "The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority."[129]

Marshall draws on his distinction between law and politics and insists that legal questions are, by their nature, questions for the judiciary. He also insists upon the inverse: political questions, by their nature, have no place before the Court.[130] But in the final pages of his decision, the section most read, Marshall downplays this distinction and posits that the Constitution itself is paramount law

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[127] Ralph Lerner, *The Thinking Revolutionary: Principle and Practice in the New Republic* (Ithaca: Cornell University Press, 1987) 124.

[128] Ibid. 130.

[129] *Marbury* at 167.

[130] "The conclusion from this reasoning is, that where the heads of the departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." Ibid. at 166.

whose meaning must be discovered by the judiciary.[131] These two threads are not necessarily contradictory, but they emphasize a difference in the scope and power of the judiciary. In the first instance, judicial power seems narrow and circumscribed; it addresses narrow legal questions and appears to fit (as neatly as it can) into the idiom of Madison's checks and balances as political devices. In the second, the very meaning of the Constitution becomes a legal question and thus speaks to the judiciary alone; it nearly asserts what Madison said could never be intended; that is, it makes the judiciary superior to the legislature. The proponents of judicial supremacy have seized on this second thread, whereas those who plead for judicial restraint tend to look to the first strand. Now it may well be that Marshall's rhetoric carries him on in this direction, even though he would still recognize the boundaries of political questions.[132] The other branches may reach constitutional issues, so long as they are political and not legal, although the crucial point, surely, is who says what a "legal" question is. Jefferson's greatest objection to Marshall's *Marbury* opinion, let us recall, was that the Court had said that it could order the executive to deliver Marbury's appointment by way of a *writ of mandamus.* Jefferson's outrage stemmed from

[131] "If the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply." Ibid. at 178.

[132] Marshall's later decisions on the Court seem to bear this out. And Marshall saw that the Congress might constitutionally limit the Court's power to hear cases and thereby limit the Court's ability to decided constitutional questions. He prudently recognized the power of the political branches and the limitations of the Court, even if his own logic might push against such a recognition. As Stephen Griffin argues, "since the Constitution structures politics and government, giving the judiciary the unique power to enforce the Constitution is tantamount to making the judiciary the most powerful branch of government. Since this is not tenable politically, the scope of constitutional law is necessarily narrow." Griffin, *American Constitutionalism*, 45.

the fact that he thought this was a matter of executive discretion and, therefore, a *political* question. Marshall, of course, thought otherwise.[133]

Following this, proponents of judicial supremacy like Alexander and Schauer insist that the Court must settle all constitutional questions—even those that aren't clear. In fact, the authoritative settlement of unclear constitutional issues becomes one of the Court's most important functions, "insofar as the Constitution is susceptible to divergent view about what it means . . . an important function of the Constitution remains unserved."[134] Such settlement is the Court's task, venturing that the scope of constitutional law should be ever larger; indeed, one could say that constitutional questions are judicial questions. These advocates deny that the other branches have much of a role to play in determining constitutional meaning. Alexander and Schauer argue, for example, that the president should be consistent with prior Court opinions on constitutional issues when he signs or vetoes a law; to act otherwise is to undermine the Constitution.[135] Laurence Tribe even goes so far as to insist that the executive should not veto a law because he thinks it unconstitutional. In an extraordinary fit of hyperbole, Tribe has suggested that such an act is "an abuse of the fundamental structure of our system of government" in that it "unilaterally . . . deprives the court of their unique Constitutional function: to pass on legislation that is not

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[133] Walter Murphy, *Congress and the Court: A Study in the American Political Process* (Chicago: University of Chicago Press, 1963) 7-19.

[134] Alexander and Schauer, "On Extrajudicial Constitutional Interpretation," 1377.

[135] Alexander and Schauer, "Defending Judicial Supremacy," 471. Even those like Scott Gant and Barry Friedman who think the other branches can speak to the Constitution, suggest that they must follow the Court once it has spoken. Gant, "Judicial Supremacy" and Barry Friedman and Michael Dorf, "Shared Constitutional Interpretation" *Supreme Court Review* 2000 (Chicago: University of Chicago Press, 2001).

obviously unconstitutional."[136] An historical understanding of the executive veto shows that it is utterly appropriate, indeed it is the very basis of the veto as originally conceived, that the president veto legislation that he thinks goes beyond the legislature's constitutional limits.[137] Yet, as Tribe would have it, only the judiciary may speak to constitutional issues. Alexander and Schauer echo this, "[the] executive and legislative officials should do what *they* are assigned to do, and what t*hey* are assigned to do does not include constitutional interpretation."[138] The legislature must only make laws and not question the Court's interpretation of those laws' constitutionality. The legislature may not even venture nonbinding opinions as to the Court's constitutional interpretation. To do so, Tribe says, undermines our constitutional system: "At stake . . . is not simply an attack . . . on the binding effect of the Constitution, as construed by the Court, upon those whom the people elect to public office—those whose oaths to uphold the Constitution as the supreme law of the land can be enforced in no other way than through Supreme Court review."[139] This insistence is not backed up by empirical evidence, but rests solely on the notion of the legal Constitution. Tribe even suggests that the oath to uphold the Constitution sworn by both the executive and legislative branches amounts to an oath to follow the Court's interpretation of the

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[136] Laurence Tribe quoted in Sanford Levinson, *Constitutional Faith*, 48. See also Tribe, *American Constitutional Law* third edition, volume one (New York: Foundation Press, 2000) especially 118-206 on the separation of powers.

[137] For a discussion of Jackson's transformation of the Veto power, see Magliocca, "Veto!" See also, James Ceaser, *Presidential Selection: Theory and Development* (Princeton: Princeton University Press, 1979); Scigliano, *The Supreme Court and the Presidency*; and Skowronek, *The Politics Presidents Make*.

[138] Alexander and Schauer, "On Extrajudicial Constitutional Interpretation," 1367.

[139] Quoted in Gary Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration*, 133.

Constitution and not to look to the document in their own right. If we take the proponents of judicial supremacy seriously in this, legislators should never look to the Constitution or even be concerned with whether the laws they are passing are constitutional—they are simply not equipped to answer such questions.[140] While playing up the separation of powers in this regard, Tribe subverts the Madisonian vision of it. The separation of powers becomes the vehicle whereby Tribe articulates the Court's—and only the Court's—relation to the Constitution. There are, it would seem, no checks on judicial interpretation other than formal constitutional amendment. Worse, if only the Court prevents constitutional violations, we are at its mercy. If it gets them wrong, we have nowhere to turn, even if the president, the Congress, and the people recognize the fault. This is the legal Constitution with a vengeance. The Constitution is what the Court says it is. Such a conception of judicial interpretation, Corwin has noted, "invokes a miracle. It supposes a kind of transubstantiation whereby the Court's opinion of the Constitution . . . becomes [the] very body and blood of the Constitution."[141]

The focus on the Court and the Constitution as law leads these legal scholars to neglect questions of constitutional maintenance, history, and development. Consider Tribe's (and seemingly Alexander and Schauer's) rejection of the presidential veto on constitutional grounds, suggesting the veto

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[140] A position, Alexander and Schauer remind us, that FDR pushed when trying to overcome Congress' doubts about the constitutionality of some New Deal legislation, but not one he accepted when the Court rejected that same legislation on constitutional grounds. And if we follow their logic, the New Deal Constitutional revolution should never have occurred, as the Court, in the name of stability and settlement, should have adhered to its past decisions even if they were wrongly decided..

[141] Corwin, *Court Over Constitution*, 68.

may only be used for political reasons.[142] The great irony, of course, is that the use of the presidential veto on other than constitutional grounds was itself a major constitutional development. And the further irony is that the development came as President Jackson objected to the rechartering of the national bank on both constitutional and policy grounds, doing the very thing that the proponents of judicial supremacy say cannot be done. While such defenses of judicial supremacy are extreme, they are not altogether divorced from Marshall's and Hamilton's legal formulations of the Constitution and its peculiar relationship to the judiciary.[143] Alexander and Schauer put all of this quite simply: "We call it law."[144]

Conclusion: Dueling Constitutions

Madison's constitutionalism suggests that constitutional politics operate in a far broader realm than that within which the courts operate. Is judicial finality, even as a matter of prudence, necessary to provide authoritative settlement, as is so often asserted? This is an empirical question, not a matter of logic. The opposite might in fact be true. What if the development of constitutional law as coterminous with constitutionalism has meant the frequent recurrence to constitutional issues where the Court does not truly provide for authoritative settlement, but rather invites continual dispute on constitutional meaning and whether the Court got it right? Could a more political settlement last

[142] For Alexander and Schauer the president may veto legislation on constitutional grounds if he is following past judicial opinions and not exercising independent judgment; in fact, there is probably an obligation for the president to strike down laws the Court has determined to be constitutionally suspect.

[143] Corwin himself was speaking of Marshall's argument in *Marbury*. *Court Over Constitution*, 68.

[144] Alexander and Schauer, "Extrajudicial Interpretation," 1387.

longer, in that it must reach consensual settlement between the branches? Is a sort of constitutional politics between the branches of government a part of our constitutional system, even one that connects the Constitution to the public?[145] Constitutional politics may be less tumultuous and more frequent than Ackerman suggests.[146] It may be that the process of maintaining constitutional boundaries and articulating constitutional meaning is a much richer process than judicial supremacy would lead us to believe. These questions will be taken up in the chapters to follow, not just to investigate the claims of judicial supremacy and the prevailing myth, but to better understand our Constitution.

An historical and empirical analysis will let us see if the Court has, in fact, acted as the authoritative settler of constitutional meaning. Such an analysis will also let us get at the presuppositions of judicial supremacy: (1) That judicial review implies judicial supremacy. But must a strong and independent judiciary exercising judicial review necessarily lead to judicial supremacy? If it does not, then we may distinguish empirically—and not just conceptually—between judicial review and judiciary supremacy. (2) The judiciary is the only institution that cares about constitutional limitations, whereas the president, the Congress, and the people are eager to overstep such limits and will eagerly do so in the absence of judicial supremacy. If neither of these claims is borne out empirically (and they are usually posited as fact rather than demonstrated) then the case for

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[145] The research I'm proposing only focuses on the national government and national law. It may be that judicial supremacy does not work at the national level, but may well work against state law and thereby bind the states in an authoritative manner. So I do not take up the issue of states interpreting the Constitution and not being bound by other interpretations.

[146] *We the People: Transformations.*

judicial supremacy rests primarily upon an insistence that judicial settlement is central to the Constitution as law. And if we reject that the Constitution must be understood in such terms, then the argument for judicial supremacy exists on a logical plane completely divorced from the actual functioning of our constitutional government.

As a polity we may give primacy of place to the Court in determining constitutional meaning. But even if this is true—and it is an empirical question that is underinvestigated—the Court's role is subject to change over time and thus is historically contingent. Patterns of constitutional development will very likely depend upon what all of the branches of government are doing. While we may accept a sort of judicial supremacy at one moment—suggesting an often overlooked political basis to judicial power even at these moments—we may revise this concept at later moments depending upon the very actions of the judiciary. This draws our eye toward important constitutional issues and developments that are not, properly speaking, legal but political.

CHAPTER 2

CONGRESS, THE SUPREME COURT, AND THE MEANING OF THE CIVIL WAR AMENDMENTS

The Fourteenth Amendment: The Centrality of Constitutional Politics

The Fourteenth Amendment offers a unique prism through which we may view constitutional politics. Unlike most provisions of the Constitution, this amendment, by way of section 5, explicitly invites congressional enforcement (and hence interpretation): "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[1] For those who hold that the Court alone must interpret the Constitution, section 5 is a sort of embarrassment.[2] Constitutional language that is aimed at Congress amounts to an admonition, as Justice Kennedy recently suggested, to enforce the Court's reading of the Constitution and not the Constitution itself (as construed by Congress).[3] It is terrain ripe for contests over constitutional meaning, as it seems to pit judicial supremacy and departmentalism, the "legal" and the "political" constitutions, squarely against one another.[4] (The Fifteenth Amendment's section 2 poses the same dilemma.)

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[1] The Constitution of the United States of America.

[2] Christopher Eisgruber, "Judicial Supremacy and Constitutional Distortion" Sotirios Barber and Robert George, eds, *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change* (Princeton: Princeton University Press, 2001) 72.

[3] *City of Boerne v. Flores* 521 U.S. 507 (1997).

[4] John Finn, "The Civic Constitution: Some Preliminaries," Sotirios Barber and Robert George, eds, *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change* (Princeton: Princeton University Press, 2001) 54-60 (discussing the distinction between what he calls the "juridical" Constitution and the "civic" Constitution). See also William Harris, *The Interpretable Constitution* (Baltimore: Johns Hopkins, 1993).

Not surprisingly, just such a conflict occurred shortly after the Amendment's ratification when Congress passed a series of acts to enforce the new amendments to the Constitution. In doing so, Congress necessarily relied on its own constitutional vision. The acts themselves were attempts to ensure that the meaning of the amendments would not be subverted in the South, given the emerging violence and resistance to the dramatic changes in American federalism these amendments wrought.[5] The constitutionality of these acts, and by implication Congress' constitutional interpretation of the Civil War amendments, came before the Supreme Court under the newly appointed Chief Justice Waite. But the Court's initial opinions, given by Waite himself, hardly settled the matter.[6] To understand how constitutional meaning was arrived at, we must examine the political branches and not just the Court; the interaction between these branches is the key to constitutional settlement.[7]

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[5] Rogers Smith, *Civic Ideals* (New Haven: Yale University Press, 1997), 308-317; Harold Hyman and William Wiecek, *Equal Protection Under Law* (New York: Harper and Row, 1982).

[6] Whether the Court got the meaning of the 14th and 15th Amendments right, and how its interpretation of them has changed according to the times, is still heavily debated. A number of scholars insist that the Supreme Court got the 14th and 15th Amendments wrong; while others insist that it trimmed the expansive powers of Congress in a correct interpretation of these amendments. For a discussion of the political nature of the debate over Reconstruction itself, and its evolution on the Court, see Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham: Duke University Press, 1999).

[7] Michael Kent Curtis, *No State Shall* (Durham: Duke University Press); Akhil Amar, *The Bill of Rights* (New Haven: Yale University Press, 1998); Rogers Smith, *Civic Ideals*; William Nelson, *The Fourteenth Amendment* (Cambridge: Harvard University Press, 1988). Charles Fairman, *Reconstruction and Reunion, 1864-1888* (New York: Macmillian, 1987) argues most vehemently that the Court got it right.

The story begins with the *Slaughterhouse Cases* (1873).[8] Although at stake in these cases was a state law that granted a monopoly to the Crescent City Live-Stock Landing and Slaughter-House Company, it is a necessary beginning point because it is the first case in which the Court interpreted the Fourteenth Amendment. As such, I suggest it represents the beginning of Congressional-Court debate over the meaning of the amendment and not the judicial solidification of the amendment, as Bruce Ackerman argues.[9] The *Slaughterhouse Cases* may indeed give Supreme Court approval to the Fourteenth Amendment's constitutional legitimacy, given its peculiar ratification, but this is only part of the story. Scholars have frequently focused on the constitutional politics of the Civil War and Reconstruction era, beginning with *Dred Scott* and moving to the ratification of the Fourteenth and Fifteenth Amendments. This is not surprising as this period witnesses profound constitutional and political change that can hardly be appreciated by focusing on the Supreme Court; it calls for an examination of constitutional politics.[10] Ackerman points us in the right direction by suggesting the importance of constitutional politics for framing and establishing the amendment. Yet, Ackerman sees the politics as ending with *Slaughterhouse*. As we saw in Chapter 1, constitutional politics is an extraordinary form of politics for Ackerman, after which we return to ordinary politics and the legal

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[8] *Slaughterhouse Cases*, 16 Wall. 36 (1873).

[9] Ackerman, *We the People: Transformations*, 211.

[10] Ackerman, *We the People*. See William Lasser, *The Limits of Judicial Power* (Chapel Hill: University of North Carolina Press, 1987) and Donald Grier Stephenson, *Campaigns and the Court* (New York: Columbia University Press, 1999) 81-106.

model of the Constitution, where the Court once again takes the primary responsibility for interpreting and enforcing constitutional meaning. I venture that this misses a crucial constitutional development about the nature and meaning of the amendment: constitutional politics, albeit on a smaller scale, continued after the *Slaughterhouse Cases*, as the Congress (often with the support of the executive branch) attempted to articulate a broad reading of the Civil War Amendments that was met with skepticism from the Court. We did not return to ordinary politics or simple Court enforcement of the Constitution in 1873. Ackerman's account is odd on another level as well. He sees the constitutional politics of Reconstruction as a constitutional transformation—which embraces "substantive due process"—that is then enforced by the Court (until we get the next "constitutional transformation" in the constitutional politics of the New Deal era). But Justice Miller's majority opinion in the *Slaughterhouse Cases* (a 5-4 decision), which Ackerman sees as solidifying this constitutional transformation, hardly supports the constitutional vision the Court later articulates.

In *Slaughterhouse*, Miller upheld a monopoly granted to the Crescent City Live-Stock Landing and Slaughter-House Co. (which the Louisiana legislature bestowed after being bribed by the company) noting that it did not violate the terms of the Fourteenth Amendment's privileges and immunities clause, due process clause, or equal protection clause. Miller's opinion, in fact, eviscerated the "privileges and immunities clause," which read that "All persons born or naturalized in the United States and subject to the jurisdiction

thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States[.]"[11] Reading this clause, Miller divided citizenship into two categories—state and national—and argued that the Fourteenth Amendment only protected those privileges and immunities which were bestowed by being a citizen of the United States (and not a state citizen). He then insisted that most privileges and immunities of citizenship (such as the right to choose your trade) were derived not from our national citizenship, but from state citizenship.[12] Miller then quickly dismissed the claim that making butchers pay a fee to the Crescent City Live-Stock Landing and Slaughter-House Co. (given its monopoly) deprived them of property without due process. He then held that the equal protection clause was aimed primarily at the "newly emancipated negroes" and not butchers.[13] Thus, the Fourteenth Amendment did not apply to the butchers.

Justices Field, Bradley, and Swayne all wrote dissenting opinions (and Field's dissent was joined by Chief Justice Chase, Bradley and Swayne). Field and Bradley both argued that the Court had badly misread the nature of citizenship under the Fourteenth Amendment, which, they argued, bestowed all citizens with the fundamental rights and privileges of citizenship by making them United States citizens (thus state citizenship was only incidental to U.S. citizenship). These fundamental rights, then, were not contingent upon

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[11] The United States Constitution, Amendment XIV, Section 1.

[12] *Slaughterhouse* at 74.

[13] Ibid. at 81.

state citizenship (as Miller held). Moreover, both Field and Bradley found the monopoly granted unconstitutional—drawing on the privileges and immunities clause, the due process clause, and the equal protection clause, as various parts of a whole—as it did not serve a legitimate public purpose: the granting of a monopoly in no way served as a genuine "health" regulation, but merely transferred public power to a private company.[14] In this way, the constitutional vision Ackerman speaks of, which comes to represent late nineteenth century police powers jurisprudence, is far better represented by the various dissents—especially Field's (a point Ackerman himself concedes)—than Miller's majority opinion. As Ackerman argues, "the Lochner Court was doing what most judges do most of the time: interpreting the Constitution, as handed down to them by the Republicans of Reconstruction."[15] What is odd here is that Ackerman is arguing that an opinion of the Court solidifies a constitutional transformation based on the Republican Congress' constitutional vision, but does so in an opinion that seems to subvert the very meaning of that vision. I suggest that Ackerman misses this because he ends the story too soon, and thereby neglects the significant constitutional change that comes after the *Slaughterhouse*

[14] Ibid. at 87-88 and at 119-20. Swayne went so far as to call the Civil War amendments a new Magna Charta, which fundamentally altered the relationship between the states and the national government.

[15] Ackerman, *We the People*, 280.

decision.[16] The *Slaughterhouse Cases* may, as Ackerman argues, represent an acceptance of the Fourteenth Amendment's legitimacy by all nine justices of the Supreme Court, even while acknowledging that the Court itself was sharply divided over the Amendment's *meaning*. This debate over meaning is a central constitutional development, and it was not settled in the extraordinary politics of 1860-1868, but in the far more ordinary politics of 1870-1883. What's more, this debate occurs between the Court and the political branches, not simply among the justices, or with the newly appointed justices articulating the Reconstruction Congress' constitutional vision. We do not quickly return, after the *Slaughterhouse Cases*, to a legal articulation of constitutional meaning. Indeed, the very meaning of the amendment, despite the Court's opinion, is debated within Congress, between the Congress and the Court, and within the Court itself as it modifies and clarifies its interpretation in subsequent opinions.

Subverting Congress' Constitution by Indirection: *Reese* and *Cruikshank*

As violence erupted in the South (and in much of the North) against Reconstruction governments and the move to black equality, the Republicans controlling Congress realized that the Civil War Amendments would not be self-enforcing. In response to this, and with the strong approval of the Grant Administration, Congress passed a series of enforcement acts from 1870-

[16] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1994) and "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building" *Studies in American Political Development* 11: 149-189 (1997) offers a far more persuasive telling of the constitutional vision of the Court during this era.

1872. The Acts were an attempt to give sustenance to the newly ratified Fourteenth and Fifteenth Amendments, the terms of which were being evaded by black codes, intimidation, and outright rejection.[17] Congress established the machinery to implement the acts and bring rigorous enforcement of the amendments through both the newly created Department of Justice and the federal courts. In attempting to enforce section 1 of the Fifteenth Amendment and section 1 of the Fourteenth Amendment, Congress necessarily put forward, even if indirectly, a view of the amendments' meanings (the specifics of which we will take up below). The various enforcement acts revealed congressional determination to secure these freshly won rights. Some of this stemmed from a determination to capitalize on black suffrage in the South, adding numbers and an important constituency to the Republican coalition. Republicans were just as motivated by a principled constitutional vision: they were determined to see that the Union did not return to the pre-Civil War Constitution as articulated by the infamous *Dred Scott* decision. A scant few years after these amendments' ratification, they were already being ignored or interpreted so as to limit their power. In reaction to this, congressional debates over enforcement represent a principled constitutional debate about the meaning of Section 1 of both the Fourteenth and Fifteenth Amendments, whereby the majority in Congress took the text of the Constitution seriously and, in doing so, offered a principled constitutional vision that included a robust view of constitutional rights. Congress' attempt to protect

[17] Hyman and Wiecek, *Equal Protection Under the Law*; Rogers Smith, *Civic Ideals*, 327; Alfred Kelly, Winfred Harbison, and Herman Belz, *The American Constitution: Its Origins*

constitutional rights in this period is inescapable, and it is the Court that seems determined to thwart Congress' protection of constitutional rights.[18]

The Court as Principled Protector of Constitutional Rights?

In *United States v. Reese* and *United States v. Cruikshank*,[19] the Court continued its subversion of the Reconstruction Congress' constitutional vision begun in the *Slaughterhouse Cases*. The Court took this a step further in these cases as each dealt with Congress' enforcement powers under the Fourteenth and Fifteenth Amendments in addition to the substantive meaning of each amendment. In doing so, the Court severely limited Congress' enforcement power. Both *Reese* and *Cruikshank* took up the constitutionality of provisions of the most important Enforcement Act, that of May 1870, which was generally aimed at protecting the right to vote. The act was entitled "An Act to enforce the Right of Citizens of the United States to vote in the Several States of the Union . . ." and set penalties for state officials who denied the right to vote on racial grounds, or for private persons who conspired to prevent the exercise of this right. While these parts of the act were aimed at implementing

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and Development, Volume II, Seventh Edition (New York: W.W. Norton, 1991) 346-350.

[18] One might argue, as Michael Less Benedict does, that the Court was merely articulating the Constitution, which didn't allow for such sweeping congressional legislation, even if it were rights enforcing. This is plausible, but irrelevant for the general argument for the judicial protection of rights. Defenders of judicial supremacy like Laurence Tribe and Ronald Dworkin insist that the Court, unlike the political branches, as it is insulated from popular will, will protect constitutional rights. In doing so, they do not argue that the Court will misinterpret the Constitution so as to protect rights that are not there. Rather, they argue that political branches have no reason to protect rights, while the Court, blessed with independence, can rely on principle to protect rights. It's a general proposition that Courts are more likely to protect rights than legislatures. But it's not clear that this general proposition is empirically borne out. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1987) and *Taking Rights Seriously* (Cambridge: Harvard University Press, 1985); Laurence Tribe, *American Constitutional Law* third edition, volume one (New York: Foundation Press, 2000).

the Fifteenth Amendment, the Act also made it a crime to conspire with the intent of hindering any citizen in the full exercise of any right or privilege granted by the Constitution or laws of the United States, which was aimed at protecting the "privileges and immunities of citizenship" in section 1 of the Fourteenth Amendment (justified by way of section 5).

In *Reese,* the Supreme Court took up the constitutionality of sections 3 and 4 of the Act, which made it a crime for any official or any person to act to deny the right to vote. Two Kentucky municipal elections inspectors were charged with refusing to receive or count the vote of a black man, William Garner. Chief Justice Waite's opinion for the Court is perhaps most memorable for asserting, "The Fifteenth Amendment does not confer the right of suffrage upon anyone." Rather, it simply "prevents the States, or the United States, . . . from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude."[20] Waite then went on to find sections 3 and 4 of the Enforcement Act unconstitutional, as they were not confined to infringements of voting rights based upon "race, color, or previous condition of servitude."[21] Recognizing the right not to be deprived of the vote based upon race, Waite's opinion thereby recognized Congress' power under section 2 of the amendment to enforce this more limited right (rather than the general right to

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[19] *United States v. Reese*, 92 U.S. 214 (1876) and *United States v. Cruikshank*, 92 U.S. 542 (1876).

[20] *Reese* at 217.

[21] Robert Goldman suggests Waite didn't explicitly find sections 3 and 4 unconstitutional, but found them "insufficient." *Reconstruction and Black Suffrage: Losing the Vote in Reese and Cruikshank* (Lawrence: University Press of Kansas, 2001) 100.

vote). Yet, that seemed to be exactly what Congress was doing in the Enforcement Act of 1870, as sections 1 and 2 of the act, which directly preceded sections 3 and 4, explicitly addressed the issue of race. As Justice Hunt pointed out in a compelling dissent, if sections 3 and 4 are read in light of sections 1 and 2, then they are limited to denying the right to vote based upon race and therefore are within the clear confines of section 2 of the Fifteenth Amendment.[22] Waite, though, gave an over broad view of a congressional statute in order to find that statute beyond the scope of congressional power.[23]

Odder still is the fact that Waite's opinion did not specifically find sections 3 and 4 of the Enforcement Act unconstitutional, instead it found them insufficient.[24] So they were no longer good law, but what was the constitutional reason—what principle did the Court offer—for rejecting them? Or, what constitutional guidance did this offer the legislature? As I have suggested, as a necessary first step for the Court to authoritatively settle questions of constitutional meaning, it must lay down fully theorized constitutional opinions that give the political branches clear constitutional guidance. As a corollary, the Court must follow its precedents to provide for stable constitutional meaning. Waite's opinion, though, cuts in two directions.

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[22] *Reese* at 241-242 (Hunt dissenting).

[23] David Currie, *The Constitution in the Supreme Court, 1789-1888* (Chicago: the University of Chicago Press, 1985) 393-394, Rogers Smith, *Civic Ideals*, 336, Scaturro, *The Supreme Court's Retreat from Reconstruction* (Westport: Greenwood Press, 2000) 41, Goldman, *Reconstruction and Black Suffrage*, 90-100.

[24] Though Waite does invoke language that hints at the unconstitutionality of the whole statute. *Reese* at 217.

To borrow Cass Sunstein's language, Waite's opinion is both narrow *and* wide, both shallow *and* deep.[25] Sunstein describes the theoretical grounding of Court opinions as deep or shallow, and the range of cases the opinion applies to as narrow or wide. So a deeply theorized opinion that applies to a range of cases is both a deep and a wide opinion. Alternatively, a "case-by-case" approach renders shallow and narrow opinions—that is, an opinion that gives almost no theoretical grounding to defend its results and does not apply to legislative activity beyond the current case.[26] In this language, Waite interpreted the Fifteenth Amendment widely and deeply: it conferred the right not to be discriminated against based upon race in the exercise of the franchise and nothing more. His wide and deep reading spelled out very clearly the meaning and terms of the Fifteenth Amendment and how it would be applied in the future, even while offering a narrow view of the constitutional right at stake (that is, it only bestowed a right *not* to be discriminated against). Congress could, then, by appropriate legislation, enforce this (narrow) right. Given his clear constitutional rule, Waite therefore found sections 3 and 4 wanting because they were not clearly hewed to the amendment's meaning—they were not based, that is, upon race (which came under the purview of the Fifteenth Amendment) but general discrimination (which did not).[27] Presumably, Congress could re-pass the legislation, making this issue clear by narrowing the terms of the statute to racial discrimination, and the Court

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[25] Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1998) 10-14.

[26] Ibid. 17.

would find it constitutional. If this is so, we have an emerging constitutional dialogue between Congress and the Court wherein the Court is asking Congress to clarify the constitutional basis of the statute and giving it clear constitutional guidance in doing so.[28] But it is not so simple. If we follow Justice Hunt, we can easily doubt that this is what the Court was asking of Congress, as Congress had already limited the statute to these very terms.[29] By way of statutory (mis)construction, the Court hemmed in Congress' constitutional power without explicitly denying that power: it told Congress that it must do what it had already done. Thus, under the cover of judicial minimalism, the Court rejected Congress' constitutional vision, but did so in a way that did not bring it into explicit conflict with Congress.[30] Waite's opinion let off the two men indicted, but left the constitutional question vague and at least partly open. This is hardly a principled constitutional opinion striking down a crass political act of Congress.

The question of constitutional clarity and principle is even more prevalent in *Cruikshank*. Handed down the same day as *Reese*, the new Chief

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[27] *Reese* at 216.

[28] Charles Fairman argues, "It is not to be doubted that if Congress had enacted the substance of Sections 3 and 4 in apt language, the validity of the legislation would have been affirmed." But it is to be doubted, because there is a powerful argument that Congress had already done just this and the Court had ignored it. *Reconstruction and Reunion*, 1864-88, 257. For a general critic of Fairman, see Curtis, *No State Shall Abridge*, 100-105.

[29] "By the words 'as aforesaid,' the provisions respecting race and color of the first and second sections of the statute are incorporated into and made a part of the third and fourth sections." *Reese* at 242 (Hunt dissenting).

[30] Belz suggests the opinion was appropriate as it clearly limited congressional action to the terms of the amendment. Yet he does not take up the fact that Congress, in sections 1 and 2 of the act, had already done this. *The American Constitution*, 358. As Currie argues, "the Court got around this difficulty by proclaiming . . . that it had not power to rewrite an overbroad statute." *The Constitution in the Supreme Court, 1789-1888*, 395.

Justice again wrote the opinion of the Court, but did so in a way that skirted the constitutionality of the Enforcement Act, even while expounding upon the meaning of the Fourteenth and Fifteenth Amendments. In the wake of one of the bloodiest events of Reconstruction, the Colfax Massacre, federal officials indicted nearly 100 whites for "conspiring" to deprive two black men of their constitutional rights. The Court's opinion ultimately turned on sections 6 and 7 of the act, which made it a crime for private citizens to conspire to deprive a citizen of rights protected by the Constitution or federal law. At first glance, Waite's opinion seems consistent with the notion that the Court is likely to provide stable constitutional meaning (by following its precedents) as the opinion rested squarely on the notion of "dual citizenship" recently articulated by the Court in *Slaughterhouse*. Following Miller's opinion, Waite divided the rights of citizenship—those recognized in the "privileges and immunities clause" and the "due process clause" of the Fourteenth Amendment—into state and federal rights.[31] The vast majority of rights, Miller had argued, are held by virtue of being a citizen of a state. Freedom of speech, the right to vote, and the like were all based upon state citizenship and therefore protected by the states. Such rights do not come under Fourteenth Amendment protection. A handful of rights—the right to protection on the high seas, for example—are conferred by virtue of being a citizen of the United States and do come under Fourteenth Amendment protection. These are the rights that Congress can protect under section 5 of the Fourteenth Amendment. All other

[31] *Cruikshank* at 549.

rights are protected by the state and beyond the reach of congressional power.[32] This is true, as well, for section 2 of the Fifteenth Amendment, which, as we saw in *Reese*, did not confer the right to vote, but the right not to be deprived of one's vote on the basis of race. As with the *Slaughterhouse Cases*, the Court's reading of the Fourteenth Amendment, to paraphrase Field, made it much ado about nothing: it essentially left intact the dubious view of citizenship articulated by Chief Justice Taney in *Dred Scott*—the very view the Fourteenth Amendment was meant to overturn! The only dramatic alteration was that now blacks could be citizens of the United States (and were therefore protected in the few rights of citizenship thereby bestowed).

Once Waite divided rights into federal and state protection, the question was: Were the rights allegedly violated here, rights protected by the federal government and therefore subject to Congress' power under section 5 of the Fourteenth and section 2 of the Fifteenth Amendments? Here Waite did two extraordinary things. First he turned to an analysis of the indictments themselves and not section 6 of the enforcement act, which the indictments were based upon. He then suggested that two of the rights (First and Second amendment rights) were only protected against the federal government and not the states, so they were beyond the reach of the statute in this case.[33] Remarkably, Waite relied on Marshall's *Barron v. Baltimore* opinion in 1835, which held that the Bill of Rights did not apply to the states, and ignored the question of whether section 1 of the Fourteenth Amendment had

[32] Unless the state first fails to protect them, which came out of later opinions.

fundamentally altered this relationship (as many within Congress who had framed the amendment argued), leaving Marshall's opinion a historical relic of pre-Fourteenth Amendment jurisprudence.[34] Instead, Waite rather cavalierly asserted that it was now "too late to question the correctness of this construction [*Barron v. Baltimore*]."[35] A constitutional amendment was reduced to nothing based on a prior Supreme Court precedent! Waite then concluded that the Fourteenth and Fifteenth Amendments only protected one from being deprived of rights based upon race and then only against official state action. The trouble with the indictments, Waite argued, was that the alleged deprivation of rights was not clearly asserted to be based upon race, nor was it a direct result of state action.[36]

What is most remarkable about Waite's opinion is that he reaches out broadly to expound upon the nature and meaning of both the Fourteenth and Fifteenth Amendments, and, in doing so, rejects much of the congressional interpretation of these amendments as put forward in the Enforcement Act; but he does all of this indirectly. In fact, Waite doesn't even question the

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[33] *Cruikshank* at 553.

[34] Ibid. at 552.

[35] Ibid.

[36] It "is nowhere alleged in these counts that the wrong contemplated against the rights of these citizens was on account of their race or color." Ibid at 555.

constitutionality of section 6 of the Enforcement Act.[37] He merely finds the indictments wanting: although the clear implication is that not only is this section of the act unconstitutional, but that Congress' broader reading of the meaning of the Fourteenth and Fifteenth Amendments is invalid. This is a minimalist judicial opinion that delivers maximum results. Nothing is explicitly declared unconstitutional.[38] At a glance the opinion seems to rest upon the particular facts of the case and does not address the broader constitutional question or give us a constitutional rule to follow; it is, in Sunstein's terms, narrow and shallow. But this is not truly so. The Court offers a fully theorized view of the Fourteenth and Fifteenth Amendments, which rejects Congress' view as articulated in the enforcement acts and severely limits Congress' ability to enforce the amendments, if we follow the logic of Waite's opinion. We might say that all of this is simply *dicta*, the trouble is that the reasoning is not superfluous but central to the Court's narrow conclusion. Waite can only find the indictments "wanting" based upon his reading of the amendments (which rejects Congress' reading) and his finding of section 6 of the Enforcement Act overly broad (although he does not explicitly find it unconstitutional). This is a masterpiece of judicial sleight

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[37] The Court's opinion is so sly on this fact that Lee Epstein, Jeffrey Segal, Harold Spaeth, and Thomas Walker, *The Supreme Court Compendium: Data, Decisions, and Developments* (Washington, D.C.: CQ Press, 1994) do not even list *United States v. Cruikshank* as a Court decision holding an act of Congress unconstitutional (because it does so by indirection rather than explicitly) 96. Warren, *The Supreme Court in United States History*, 604; Belz, *The American Constitution*, 357; Currie, *The Constitution in the Supreme Court*, 395-397; and Smith, *Civic Ideals*, 334-336, all treat the opinion as striking down an act of Congress. Indeed, all discuss it in explicit terms of the constitutional vision it offered up and not the narrow holding.

[38] "It follows that they [the indictments] are not good and sufficient law." *Cruikshank* at 559.

of hand, not clear reasoning based upon constitutional principle—a sleight of hand, we ought to notice, that allows the Court to deny, rather than enforce, constitutional rights that Congress was trying to protect. By not taking on Congress directly, the Court makes it difficult for Congress to respond. One gets the feeling that the Court is determined to disallow the rigorous enforcement of the amendments even if Congress attempted to conform to the Court's constitutional view. Moreover, the Court's broad constitutional view, not just the narrow result, is celebrated and becomes the basis of future Supreme Court opinions which far more explicitly speak to constitutional meaning.[39]

Principle and Precedent in Court and Congress

As Charles Warren argues, "viewed in historical perspective . . . there can be no question that the decisions in these cases were most fortunate. They largely eliminated from National politics the negro question which has so long embittered Congressional debates; they relegated the burden and the duty to protecting the negro to the States, to whom they properly belonged; and they served to restore confidence in the National Court in the Southern States."[40] Chief Justice Waite, in the tradition of Marshall and Taney, had taken it upon himself to deliver the Court's opinion in these highly visible and hotly contested cases and he was rewarded, by and large, with praise. While we can hardly be so sanguine as Warren, he does put his finger on something

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[39] Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," *Supreme Court Review 1978* (Chicago: University of Chicago Press, 1979).

[40] Warren, *The Supreme Court in United States History*, 608.

important: politics. Waite's opinions are most celebrated because they signal a retreat from a constitutional vision that the country was growing weary of and beginning to finding taxing as it threatened an ever increasing national role in local politics. Rogers Smith suggests that "Chief Justice Waite's opinions for the Supreme Court were redolent of the Northern Republican retreat from continued civil rights struggles."[41] The changing political tide, not simply the Court's opinions, is key to getting at constitutional development. Robert Goldman reminds us that in *Reese* and *Cruikshank*, important as they were, only two sections of the various enforcement acts were found unconstitutional and those sections, based on the Court's opinion in *Reese*, were re-passed (with little modification) shortly after the decision was handed down (which I'll take up below).[42] The point is that at this moment in time, Congress's power to enforce the terms of the Civil War Amendments and the very meaning of those amendments was still an open constitutional question. Conceptually, we might characterize this as a movement from an open (or unsettled) constitutional question to a constitutional dialogue about that meaning.

This initial constitutional dialogue between Court and Congress, short lived as it was, is illuminating. How did Congress and Court conduct themselves? Against the persistent insistence that the Court is more likely to conduct itself in a reasoned manner and base its decisions on constitutional

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[41] Smith, *Civic Ideals*, 336.

[42] Goldman, *Reconstruction and Black Suffrage*, 109. See also Robert Goldman, *A Free Ballot and a Fair Count: The Department of Justice and the Enforcement of Voting Rights in the South, 1877-1893* (New York: Fordham University Press, 2001) 17.

principle, the evidence here suggests that it fares far worse than Congress in this particular case. We have already seen the Court's shortcomings in *Reese* and *Cruikshank* in this regard. While "the country needed elementary instruction . . . to explain basic propositions about the Constitution as it then stood," attention to the debates in Congress indicate that it was far more likely to get such instruction from Congress than the Court.[43] While Fairman tries to insist that the "consideration [to the Civil War Amendments] given by the Court was much the most responsible," this is simply not borne out.[44] Recent scholarship on the Civil War Amendments and the Reconstruction Congress impress upon us the high-minded constitutional debate that took place in Congress.[45] Congress was not only concerned with producing a clear constitutional vision, but went out of its way to enforce the constitutional norms embraced by the Civil War Amendments in the legislation we have been examining. Even if the Court does not act as a principled defender of constitutional rights, perhaps it provides for constitutional stability against the unpredictable whims of the legislature. After all, the leading proponents of judicial supremacy insist that the Court's settlement function is its most important function, even if it gets the Constitution wrong.[46] Thus, even if the

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[43] Contrary to Fairman, *Reconstruction and Reunion*, 273.

[44] *Reconstruction and Reunion*, 278.

[45] Curtis, *No State Shall*; Amar, *The Bill of Rights*; Smith, *Civic Ideals*; Nelson, *The Fourteenth Amendment*; Ackerman, *We the People*; Hyman and Wiecek, *Equal Justice Under Law*; Scatturo, *The Supreme Court's Retreat From Reconstruction*. Even Raoul Berger's account of the Fourteenth Amendments confronts one with the seriousness with which Congress took up constitutional questions. *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Liberty Fund Press, 1998) second edition.

[46] Alexander and Schauer, "On Extrajudicial Constitutional Interpretation."

Court did not defend constitutional principle, at least it provided for constitutional settlement, avoiding the chaos that would come if things were left to the Congress. This is not evident. Congress adhered to a remarkably stable constitutional vision from 1865-1874. As Hyman and Wiecek demonstrate, Congress moves from general principles to particular applications in order to enforce constitutional norms as, at nearly every turn, they are resisted.[47] This vision itself is stable. Against this, it is the Court that lacks stability in its treatment of these amendments.

This is reflected in Supreme Court opinions themselves. Early circuit court opinions, which included sitting Supreme Court justices, were far more receptive to Congress' reading of the Civil War Amendments and its enforcement powers. That began to change with the *Slaughterhouse Cases* and then with *Reese* and *Cruikshank*.[48] It might be suggested that once the Supreme Court spoke on these issues—and much less generously so than the Circuit Courts—it pronounced a uniform view allowing for the settlement of constitutional meaning. This is plausible in that we see dissenting justices join later Court opinions. We see this most vividly in Justice Bradley, a sharp dissenter in the *Slaughterhouse Cases.* Bradley initially offered a robust reading of Fourteenth Amendment rights and Congressional power in his circuit court opinions and in his *Slaughterhouse* dissent,[49] but then, a few

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[47] Hyman and Wiecek, *Equal Justice Under Law.*

[48] Smith, *Civic Ideals*, 327-330; Belz, *The American Constitution*, 355.

[49] *Live-Stock Dealers' and Butchers' Association v. Crescent City Live-Stock Landing and Slaughter-House Co.,* 15 F. Cas 649.

years after *Slaughterhouse*, in his circuit court opinion in *Cruikshank*,[50] he put forward the logic that Chief Justice Waite would rely on in his *Cruikshank* opinion, which flatly rejected Bradley's *Slaughterhouse* dissent. This culminated in Bradley's opinion for the Court in the *Civil Rights Cases* of 1883 (which we will take up below).[51]

The trouble with this view is that it neglects the evolution of constitutional meaning under the Supreme Court (and not just changes in the individual justices' opinions). The Court may follow its precedents (as it did in *Cruikshank*), as proponents of judicial supremacy would suggest, thereby providing for stability in constitutional meaning. But the precedents themselves gradually spin out constitutional meaning that, while often consistent with past cases, is not required by them. The Court does not provide for more stability in expounding constitutional meaning than the Congress does. In fact, in these cases, the Court's exposition seems less principled (both in the sense of being based on constitutional principle and in the sense of offering rule-based opinions that the political branches can clearly follow). As we have seen from *Reese* and *Cruikshank*, the Court does not lay down a clear constitutional rule. For the Court to authoritatively settle constitutional questions and bind the other branches to its interpretation, it must give us wide and deep rulings. The Court must settle the constitutional question before it, not simply the case before it. Alexander and Sherwin suggest that authoritative settlement "is precisely to settle the question what

[50] *United States v. Cruikshank*, 25 F. 707 (1874).

ought to be done."[52] For the proponents of judicial supremacy, authoritative settlement is necessary for the Constitution to function as law. Principled and fully theorized opinions are necessary to this settlement function. Without them, Alexander and Sherwin argue, we will get instability and indeterminacy which is detrimental to the very nature of law.

It is doubtful, though, that the Supreme Court always (or even generally) acts in this fashion. Even if the Court lays down broad rule-based decisions, particular circumstances will bring new cases under those terms and the Court will need to address them. So, in a limited sense, there will always be a revisiting of constitutional questions. This is not terribly problematic.[53] What is troublesome for such theorizing is when the Court does not pronounce clear rules in the case before it: *Reese* and *Cruikshank* do not tell members of Congress or the executive branch—or citizens for that matter—"what ought to be done." Even if we wanted to abide by the Court's interpretation of the Constitution in these cases, these opinions give us little guidance, exemplified by the fact that the Court, in *Reese*, seems to tell Congress to do what it has already done. Indeed, there is nothing particularly principled about these decisions: the Court is hardly offering us principled reasons against the political will of Congress. One might flip this on its head: the Court seems to

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[51] *Civil Rights Cases*, 109 U.S. 3 (1883).

[52] Alexander and Sherwin, *The Rule of Rules*, 12.

[53] Although one does wonder if this itself cuts against the kind of authoritative settlement Alexander and Sherwin argue for. Indeed, do they end up saying: "follow the Court, whatever the Court says." This may not provide any stability, or any "true settlement." *The Rule of Rules*, 13-15. In fact, we might wonder if this is simply the "gun man theory of the law" applied to the Court, so that the Constitution is whatever the Court says it is.

be evading a principled constitutional vision by way of faulty statutory construction and ducking the constitutional issue, even while waxing poetic about constitutional meaning. There may indeed be passive virtues and excellent reasons for judicial minimalism,[54] but they are antithetical to the most prominent arguments for judicial supremacy. Rather than giving us authoritative settlement, these opinions leave the constitutional question unsettled, or in a state of constitutional dialogue at best. Yet, it is not clear that such unsettlement or dialogue leads to constitutional anarchy. And even if the Court had offered a broad constitutional rule, it is doubtful that that, in and of itself, would have been enough to settle the constitutional issue.

Toward a Constitutional Settlement: the Congressional Election of 1874

Perhaps the most important development on the road to constitutional settlement occurred in November of 1874 when the Reconstruction Republicans were ousted from control of Congress by the Democratic Party. By the time *Reese* and *Cruikshank* were decided by the Court in 1876, it is not clear that there was much congressional opposition to the Court's opinions. Individual members of Congress, especially Republican holdovers who voted for the various Enforcement Acts and the Civil Rights Act of 1875, were alarmed at the Court's construction, but Congress as a whole seemed content to leave this with the Court. The constitutional questions raised by the enforcement acts and the Court's opinions were hardly settled at this point,

[54] Alexander Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press, 1964). See also Sunstein, *One Case At a Time* and Keith Bybee, "The Political Significance of Legal Ambiguity: The Case of Affirmative Action" *Law and Society Review* Volume 34, Number 2 (2000).

but the change in Congress represented a seismic shift in the political landscape that cleared the way for constitutional settlement. From 1870 to1874, the Republican-dominated Congress passed legislation that a majority of the Court viewed as constitutionally suspect. The Court and the Congress were bound to contest constitutional meaning as the Congress deemed constitutionally permissible things that the Court viewed as constitutionally impermissible. Thus the Court rejected Congress' broad constitutional vision by finding parts of the Enforcement Act unconstitutional. The precondition for this clash was Congress' aggressive stance in protecting and enforcing its substantive vision of the Fourteenth and Fifteenth Amendments. But given the lag that occurs between the passage of legislation and the Court's pronouncement upon its constitutionality, by the time the Court acted to limit Congress's view of the Fourteenth and Fifteenth Amendments by finding its legislation wanting, the (new) Congress was no longer articulating this view. After the Democrats gained control of the House of Representatives and officially took their seats in 1875, it neither supported the old Congress's stance, nor passed new legislation that the Court viewed as constitutionally suspect,[55] not because a majority of the Congress decided to adhere to Supreme Court opinions per se, but because the new majority—many Republicans as well as Democrats—had a different view of the Civil War Amendments, which coincided (more or less) with the Court's. Simply put, the dominant constitutional vision in Congress moved into alignment with the

[55] Sections 3 and 4 which were struck down in *Reese* were repassed, but never came before the Court. Goldman, *A Free Ballot and a Fair Count*.

majority of justices on the Court. What was a constitutional contest dissipated. By the time the Court explicitly found the Reconstruction Congress's handiwork unconstitutional, it was confirming, not disputing, the (new) majority view in Congress. So we traverse from a period of contested constitutional meaning to a state of unsettlement and partial constitutional dialogue back to a state of uncontested meaning. In this, Congress is central to the generation of constitutional meaning and the constitutional settlement ultimately arrived at.

Congress's Last Stand

The last great act of the Reconstruction Congress took place in the waning days of the Forty-Third Congress, just before the official change in power. The Civil Rights Act of 1875, passed in honor of the recently deceased Senator Charles Sumner, who had been trying to pass such legislation for years, put forward a constitutional vision that the incoming Congress had little interest in defending.[56] This constitutional vision would bring this transitory Congress into direct conflict with the Court. Yet, based on the only Court case to speak to the relevant constitutional questions when the act was passed, *The Slaughterhouse Cases*, this was not a forgone conclusion. So while the Supreme Court opinion was referred to, Congress does not just follow it, even while many members make reference to it, because the opinion itself needs to be expounded upon: alone it settles nothing.

[56] Scaturro, *The Supreme Court's Retreat From Reconstruction*, 15.

The most controversial sections of the Civil Rights Act outlawed racial discrimination in public accommodations based on a broad reading of Congress's section 5 power under the Fourteenth Amendment. In this case, Congress was clearly interpreting section 1 of the Amendment—the privileges and immunities of citizenship, due process of law, and equal protection—and reaching out, by way of its enforcement power, to vigorously protect its reading of Fourteenth Amendment rights.[57] The congressional debates on the Civil Rights Act, much like the earlier debates, reveal a high level of constitutional discussion, with the members engaging in constitutional interpretation on their own, as well as referring to *Slaughterhouse*. In making reference to this Court opinion, some members refused to be bound by it, arguing that "Congress is called upon to legislate, and when it comes to legislation it must legislate . . . in conformity with [its reading] of the Constitution" and not the Court's.[58] These members of Congress thought that Congress should act in conformity with its interpretation of the Constitution *no matter what the Court had or had not said*. Just as assuredly, other

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[57] Which could have been rooted in 13th Amendment as well. Hyman and Wiecek, *Equal Justice Under Law*.

[58] Frank Scaturro, *The Supreme Court's Retreat From Reconstruction: A Distortion of Constitutional Jurisprudence* (Westport: Greenwood Press, 2000) 15. See also *Congressional Record*, Forty Third Congress, 2nd Session Part III (1874) at 1791. Mr. Boutwell, "I am not disposed to discuss the Slaughter-house decision, as it is called. It will stand legally and politically for what it is worth. It related to a particular case. In that case and in every other case like that, if there shall be another case like that, it is law; but it is not law beyond the case in which the opinion was rendered, and therefore for myself I dismiss that case as a legislator when I come to consider new propositions." Boutwell then insisted "it is not law beyond the case; it is not law with reference to the rights of the states generally, and certainly is not law for the Senate when the Senate is engaged in considering a question which is a different question from that on which the court passed." Boutwell then offered a reading of the "privileges and immunities clause" akin to Field and Bradley's dissents, although never mentioning them, the logic of which squarely rejected Miller's majority opinion, at 1793.

congressmen insisted that the Congress was bound by the Court's opinion.[59] Yet there was debate over just what being bound by the Court's opinion entailed: how did the prior opinion speak to this particular constitutional issue? In answering this question, Congress was compelled to interpret the Court's opinion, weighing it, at times, against the Constitution, and against its own past actions. This Congress was perhaps unique in that many members in 1875 had acted as framers of the Thirteenth, Fourteenth, and Fifteenth Amendments. Surely they should know as much about the intent of these amendments as the Court? In this vein, a number of Senators and representatives insisted that Congress must go forward despite the *Slaughterhouse Cases,* some viewing the opinion as constitutionally wrong, others viewing it as indeterminate, but all agreeing that Congress should be bound by the Constitution, not the Supreme Court.[60] Other Congressmen insisted that the *Slaughterhouse Cases* presumptively made the act unconstitutional and that Congress ought to be bound by the Court's

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[59] *Congressional Record* , Forty Third Congress, 2nd session, Part III at 1792. Mr. Thurman, "I confess that I am amazed that in the face of the plain language of this section [privileges and immunities clause of the Fourteenth Amendment], in the face of the solemn decision of the Supreme Court of the United States adverse to this proposition [Civil Rights Act] it yet is pressed upon the Congress of the United States, and we are asked to do what the language of the Constitution does not authorize us to do, and what the solemn decision of our Supreme Court declares we have no power whatever to do," at 1792.

[60] Ibid. at 1792.

construction of the Constitution.[61] Still others cited the *Slaughterhouse Cases* to support the act, arguing that even this case recognized that the primary motivation of the Fourteenth Amendment was black equality, which is precisely what the Civil Rights Act, targeting public accommodations, was trying to achieve.[62] *The Slaughterhouse Cases* did not give Congress clear guidance here. While placing most rights under the prerogative of the states, Miller's opinion had clearly stated that the "one pervading purpose found [in the Civil War Amendments, was] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from *the oppression of those who had formerly exercised unlimited dominion over him.*"[63] Would this last part be enough to justify, for the Court, a congressional exercise of power that admittedly intruded into the

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[61] Ibid. at 1796. Much of the debate expounded upon the Constitution itself, with no reference to the Supreme Court, with many congressmen making reference to the "plain meaning of the Constitution upon its face" and adding, "that every judicial exposition of that instrument sustains this reasonable view," when the Court supported their argument, but not relying on the Court's opinions alone, at 1797. Others expressed sympathy for the Act, but insisted it was unconstitutional given *their* reading of the Constitution: "I entertain, as strongly as any Senator, the sentiments which have inspired this bill; and in the present unhappy condition of the South, I would go to the extreme limit of our constitutional power to support any bill calculated to protect the colored people of the South or to restore order in that distracted section. But I cannot go beyond the limits of the Constitution" at 1861. One Senator (Carpenter) noted the vexing question of judicial supremacy against departmentalism, treating the question of "who interprets?" as an open question, but noting that all agree that the Supreme Court settles legal questions when they are given jurisdiction in particular cases--that is, by the legislature, as a way to invoke their rights. He then noted that the *Slaughterhouse Cases* settled this issue for those bringing suit (if not for Congress as a general rule), at 1862. He thus rejected the Civil Rights Act, given the Court's various opinion on the enforcement acts, as it would "involve the colored man in litigation in which he is certain to be defeated", at 1863. In these same debates Senator Edmunds accuses the opponents of the Civil Rights Act (and the various previous acts) of willfully misreading the Civil War Amendments—obstructing their meaning at every turn, and acting as if the Constitution had not, in fact, been amended. He discoursed, at great length, on the nature of rights and equality under the Constitution without a single reference to a Court opinion, at 1869-1870.

[62] Scaturro, *The Supreme Court's Retreat From Reconstruction,* 114-128.

[63] *Slaughterhouse Cases* at 71 (my italics).

domain of the states (under pre-Civil War terms)? This was, after all, "the evil to be remedied by [the Amendments]."[64] The Court's opinion on this score is ambiguous, not because it is an undertheorized opinion—quite the contrary as we have seen—but because it did not specifically take up this constitutional question. Court opinions, no less than the Constitution, lend themselves to legitimate interpretive debate. This is not a nihilistic pronouncement that opinions are infinitely interpretable, but recognition that as constitutional debates are often about particular acts, there may be multiple plausible readings of just how a past opinion applies to different circumstances. Even if the Congress wanted to defer to the Court's judgment, given the nature of the Supreme Court's decision, the result is a constitutional dialogue. Rather than broadly settling constitutional issues with the stroke of a pen, Court opinions are likely to be worked out in the give and take of constitutional dialogue. This may be constitutional dialogue on the road to authoritative settlement, but in this case, far more than a Court opinion is necessary—for both Congress and the Court—to settle this contested constitutional question.

In relying on Court opinions to guide its constitutional interpretation, the Congress must inevitably read those Court opinions and, thereby, venture into constitutional interpretation in most cases (as the opinions themselves will not offer clear guidance on the exact issues before the Congress). Members of Congress may indeed turn to the Constitution to help them construe a Court opinion; in fact, assuming it were to follow Court opinions,

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[64] Ibid. at 81.

Congress may need to interpret Court opinions in the very way that the Court interprets the Constitution in order to apply them to particular acts. If we follow the logic of Alexander and Schauer, and other proponents of judicial supremacy, this itself is to enter forbidden terrain. Accordingly, the Congress should not venture any opinions on constitutionality, as this is the job of the Court and the Court alone: "legislative officials should do what *they* are assigned to do, and what *they* are assigned to do does not include constitutional interpretation."[65] The Constitution becomes the sole province of the judiciary in this case. The whole point of authoritative judicial settlement is that opinions "supplant the reasons upon which they are based."[66] Those who wish to follow the terms of settlement are "no longer required to consult the reasons behind the settlement in determining how to act, they are also required not to heed those reasons if, from their perspective, those reasons conflict with the terms of settlement."[67] But as we have seen, Court opinions, especially on constitutional questions, do not necessarily operate in this way. At a deeper level, if Congress is simply to follow the latest judicial pronouncement, we may go far to undermining the Constitution (and constitutional norms) in the name of upholding it. Constitutional maintenance requires more than enforcement by the judiciary.

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[65] Alexander and Schauer, "On Extrajudicial Constitutional Interpretation," 1367.

[66] Alexander and Sherwin, *The Rule of Rules*, 13.

[67] Ibid.

This constitutional dialogue between the Court and the Congress was replaced by a univocal Court, as Congress retreated from the sweep of Reconstruction. The Democrats took control of the House in 1875, *Reese* and *Cruikshank* were handed down shortly thereafter, and the Compromise of 1876 seemed to signal the end of Reconstruction politics altogether. It is tempting to say that the unsettled constitutional questions over the meaning of the Fourteenth and Fifteenth Amendments, which had convulsed the body politic for nearly a decade, were finally settled in Justice Bradley's opinion in the *Civil Rights Cases* (1883), which struck down sections 1 and 2 of the Civil Rights Act of 1875 and brought an end to this divisive public debate. Warren suggests something like this: "The meaning and effect of that Amendment [the Fourteenth], however, so far as it concerned the negro race for whose protection it had been primarily adopted, were fully and definitively settled by Waite and his Court, in a series of eight cases between 1876 and 1884."[68] Well, not quite. As I have argued, this does not capture the dynamic that paved the way for settlement: the Court's opinion stood because it reflected the political sentiment of the nation and not because it was the Court's opinion. Ackerman suggests that these issues were truly settled in the elections returns of 1868: "With their hold on national power reconfirmed in the consolidating election, Republicans in the White House and Capitol Hill

[68] Warren, *The Supreme Court in United States History*, 600. Even Michael Kent Curtis, whose work has done so much to resuscitate the Reconstruction Congress, suggests that "after rulings by the high court" the constitutional issues were settled. Properly parsed this might be true, but this issues were not settled just be judicial decision. *No State Shall Abridge*, 170.

took aggressive steps to pack the Supreme Court with men who would vindicate their new vision of the Union."[69] Yet Ackerman tries to end the story in 1873 with the (odd) affirmation of the Fourteenth Amendment in *Slaughterhouse*. He misses that some of these putative transformative appointees led the charge in overturning the Republican Congress's and President Grant's constitutional vision—namely, Waite and Bradley, both appointed by Grant and confirmed by a Republican Congress. Nor can we say that, after a lag, these justices were articulating a view based on the realigning election of 1860.[70] Serious public debate on these constitutional issues did not end in 1883 with the Court's opinion, in 1868 with a consolidating election, or in 1860 with a political realignment. The Court did not impose its constitutional view on the political branches, nor did the political branches bring about their desired constitutional vision by way of Court appointees. A serious constitutional debate between the Congress and the Court occurred from 1868-1874 on these issues. It was the change in Congress (combined with a change in the presidency with the famous "compromise of 1876") that paved the way for constitutional settlement. The Court may well have been the leading voice in constitutional interpretation after these events, but that

[69] Ackerman, *We the People: Transformations*, 211.

[70] See John Gates, *The Supreme Court and Partisan Realignment* (Boulder: Westview Press, 1992) 51-52.

was by and large because it was in agreement with the Congress.[71] In the ordinary course of events, the Court may well act as the primary expositor of constitutional meaning, especially when its view coincides, by and large, with the governing majorities'. But that is a far cry from arguing that the Court authoritatively settles constitutional meaning when that meaning *is contested* by the political branches.

This is reflected in the *Civil Rights Cases*. Bradley's opinion, for eight members of the Bench, struck down sections 1 and 2 of the Act, arguing that the Fourteenth Amendment only protected rights from state invasion (and not private discrimination). The Court explicitly rejected Congress' interpretation of section 1 of the amendment, as well as its reading of its power under Section 5. The Fourteenth Amendment only prohibited state discrimination, not private discrimination, and Congress, under section 5, could only act to preserve rights against state abridgment.[72] While the constitutional meaning of section 1 of the Fourteenth Amendment and Congress' power under section 5, had been left to implication in *Cruikshank*, the Court explicitly spelled this out in *The Civil Rights Cases*. Congress' section 5 power was severely hemmed in, denying Congress, in essence, the right to interpret the Constitution on its own; its power was rendered "corrective," giving it the ability to protect rights only if the states were

[71] Warren argues that confidence in the Waite Court was high: "When it is recalled that in every year from 1850 to 1873 (with the exception of the five years of the war) there had been Congressional legislation proposed in serious derogation of the Court's powers, the practical immunity from assault which occurred form 1873 to 1884 is a notable feature in its history." But even this is premised on the change in Congress; it reflects the fact that the Court is in line with Congress. *The Supreme Court in United States History*, 563.

involved in their denial.[73] This further spun out the logic the Court had offered earlier that year in *United States v. Harris*.[74] In *Harris*, Justice Woods, who like Bradley had once embraced a far-reaching view of the Civil War Amendments and Congress's ability to enforce them, found section 2 of the Ku Klux Act of 1871 unconstitutional.[75] The Act made conspiracies to deprive citizens of their rights a crime. Woods articulated the view that Bradley would more fully develop in the *Civil Rights Cases* that the Fourteenth Amendment only protected rights against state action (the Fifteenth was rejected as a constitutional basis of the act as it did not, as Waite said in *Reese*, confer a right to vote).[76] Furthermore, Congress could act only if the states themselves first failed to protect rights. The Thirteenth Amendment basis for the act was rejected, in a statutory construction reminiscent of *Reese*, because the conspiracy charges were not limited to acts against blacks. *Harris* clearly built upon *Reese* and *Cruikshank* and was itself more fully articulated in the *Civil Rights Cases*.[77] However much these opinions—like *Reese, Cruikshank*, and the *Slaughterhouse Cases*—thwarted the constitutional vision of the Reconstruction Congress, they were in line with the political consensus of 1883.

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[72] *Civil Rights Cases* at 11.

[73] Ibid. at 13

[74] *United States v. Harris*, 106 U.S. 629 (1882).

[75] Woods in *United States v. Hall*, 26 F. 79 (1871).

[76] *Harris* at 637.

[77] Ibid at 643, 639, and 641-642.

The New York Times, for example, claimed that Justice Harlan's famous lone dissent in the *Civil Rights Cases* was "a learned, candid, and able paper." But it went on to say, "the tendency during the war period was toward the construction he favors. Since then a *reaction* has set in, which, so far, is beneficial[.]" The Court's opinion "has satisfied public judgment, and Justice HARLAN's will hardly unsettle it."[78] The Court's opinion not only reflected popular will at the time, but seemed to embrace it. This is perhaps best reflected by Justices Bradley and Woods. Both of these justices (Bradley as a Supreme Court justice sitting in circuit and Woods as a circuit court judge) had given the Fourteenth Amendment a broad-based reading in a controversy that would come before the Supreme Court as part of the *Slaughterhouse Cases*. There both justices embraced the logic that would later be articulated in Bradley's *Slaughterhouse* dissent, rejecting Miller's distinction between the "privileges and immunities" of state citizenship and the "privileges and immunities" of United States citizenship. Yet Bradley himself would implicitly reject this reading in his circuit court opinion in *Cruikshank*, which served as the doctrinal basis of Chief Justice Waite's opinion for the Supreme Court. Woods had further spelled out the "privileges and immunities" of United States citizenship in *United States v. Hall*, offering, after corresponding with Bradley, a broad reading of the "privileges and immunities" of United States citizenship, which included all rights expressly secured in the Constitution. He went further in saying that Congress, by way

[78] Quoted in Scaturro, *The Supreme Court's Retreat from Reconstruction*, 129. My italics.

of section 5, could enforce these rights against "insufficient" state protection and not just overt discrimination. In fact, Woods argued, Congress could rely on the Thirteenth Amendment to do all of this! This early constitutional interpretation was squarely rejected by Bradley and Woods in *Harris* and the *Civil Rights Cases*. These justices might have been adjusting their views to fall into line with Supreme Court precedents as part of the Court's settlement function. Still, such an alteration should at least lead us to wonder about the putative insularity of the Supreme Court from popular opinion. The shift in congressional vision in the early 1870s, combined with the Court's reading, was the basis of the later constitutional settlement. These developments were key to shaping the constitutional meaning of these amendments. It is this meaning, forged in the constitutional politics of 1870-76, that we inherit as settled, even if the politics of this era subverted the original meaning of these amendments.[79]

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[79] Hyman and Wiecek offer an insightful line of analysis along these lines. They suggest that the passage of each subsequent enforcement act and amendment led the Court to read them in reverse order, which subsequently narrowed their scope rather than widening it. So the Thirteenth is read in light of the Fourteenth, rather than vice versa. Each successive act was more specific than the prior, but this was due to southern intransigence and not Congress's desire to abandon the broader readings. By being more particular, Congress hoped to thwart the wide spread evasion of the amendments and various enforcements acts. One result of this was the almost total eclipse of the Thirteenth Amendment, even though it was initially offered as far more than a formal end to slavery. Another result was that congressional acts helped pave the way for the "state action" doctrine the Court would later apply. While each new act was aimed at bringing an end to southern resistance, it also began to reveal just how deep Congress's commitment to enforce the amendments would have to be. Real enforcement of the amendments, it became evident, would require a substantial federal commitment in local politics—something never before seen. Facing this, it seems that many steadfast supporters of the Civil War amendments blinked. The Republican constitutional vision altered as the costs of that vision became apparent. This altered constitutional vision coincided with the Court's own articulation of constitutional meaning (which itself might have been driven by this realization).

Interestingly, the *Civil Rights Cases* can then be seen as the culmination of these developments in constitutional meaning: the Court only articulated a clear and fully theorized constitutional vision of the Civil War Amendments when that vision was shared by the Congress. It boldly pronounced (the earlier) Congress' misinterpretation of the Fourteenth Amendment and its limited power to enforce the terms of any of the Civil War amendments, when a national consensus embraced such a reading. In an interesting twist, in these cases, as public support for Reconstruction (and its constitutional vision) began to wane, it was (the lame-duck1875) Congress who, arguably, supported the Constitution against the democratic impulse. And it was the Court who went along with the democratic impulse. If there is countermajoritarian tendency here, it is on the part of the prior Congress, not the Court. This is the judicial thesis transposed: these members of Congress adhere to a principled defense of constitutional rights and a willingness to protect such rights even while it cost them politically. Against this, an insulated Court outpaces southern resistance: "on the issues of the rights of American citizens, the Supreme Court was more royalist than the king, more devoted to a restricted states rights interpretation of the Constitution than even some southern Democrats."[80] A truly countermajoritarian Court, concerned with rights and constitutional principle, would have upheld the Civil Rights Act of 1875 against a nation that seemed determined to ignore these new amendments.

[80] Curtis, *No State Shall Abridge*, 170.

We might push this even further as it relates to the typical view of judicial supremacy. We should notice that Congress by way of these various acts is pushing a robust and principled constitutional vision of rights that the Court—that great protector of rights—seems intent on striking down. The early Court opinions do this by clear statutory misconstruction and sidestepping the broader constitutional issues to reach decisions that go against the enforcement of congressional acts without explicitly finding them unconstitutional.[81] These opinions are not highly principled, clearly reasoned articulations of constitutional questions. Nor are they rights protecting. Nor do they lead to constitutional settlement. The opinions themselves evolve. They may well build upon one another in a consistent way, each new opinion developing the (partial) logic of the prior opinion to a wider area and a more general level of constitutional articulation. However, this evolution of constitutional meaning by way of Court opinions is not so simple. In *Ex Parte Yarbrough*,[82] a year after *Harris* and a mere eight years after *Reese*, the Supreme Court came very close to saying that the Fifteenth Amendment conferred the right to vote, which was explicitly rejected in these earlier opinions. *Yarbrough* was based on the two sections of the Enforcement Act of 1870 that were found wanting (rather than explicitly declared unconstitutional) in *Reese*. This time the Court explicitly upheld the action.

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[81] As David Currie suggests, even while rejecting Congress' broad constitutional reading, "the Court's restrictive interpretations of the Constitution were unavoidable, but by manipulating the statutory issues of coverage and severability the Court went out of its way to incapacitate the enforcement authorities after it was too late politically to expect Congress to fill the gap by enacting narrower statutes." *The Constitution in the Supreme Court, 1789-1888*, 402.

[82] *Ex Parte Yarbrough*, 110 U.S. 651 (1884).

What is more, the Court explicitly took up the right to vote. Waite's opinion in *Reese* unequivocally stated that the Fifteenth Amendment confers no such right. This was reiterated in Justice Woods' opinion in *Harris* just the year before. But Miller's opinion stated that the Fifteenth Amendment "does, propio vigore, substantially confer the negro the right to vote, and Congress has the power to protect and enforce that right."[83] Just as we should be suspicious that the Court is more principled than the Congress, we should be deeply skeptical of the proposition that its constitutional vision is more stable.

This strongly suggests that "finality of interpretation is hence the outcome—when indeed it exists—not of judicial application of the Constitution to the decisions of cases, but of a continued harmony of views among the three departments."[84] When constitutional questions are disputed, the political branches play a crucial role in the development and settlement of constitutional meaning. Attempts by the Court to impose a constitutional settlement in the absence of a shared consensus may promote unsettlement and even lead to the conflict and chaos that proponents of judicial supremacy are so fearful of.[85] Taney's attempt to do just this in *Dred Scott* is food for thought. It is also not clear that the clash of constitutional visions, including the modification and evolution of doctrine, leads to constitutional instability or chaos. Nor is it clear that the solidification of constitutional meaning, under

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[83] Ibid at 665. Miller does, just before, note that it is quite true that, as the Court said in Reese, the Fifteenth Amendment does not confer the right to vote, but only the right not to be discriminated against in the vote, that it may "operate as the immediate source of the right to vote." See also Goldman, *Reconstruction and Black Suffrage*, 115.

[84] Edward Corwin, *Court Over Constitution* (Princeton: Princeton University Press, 1938).

[85] Seidman, *Our Unsettled Constitution*, 161.

the rubric of Court opinions, is always desirable. This suggests that constitutional maintenance requires more than judicial enforcement, especially if the Constitution is to be more than a formal mechanism of legal settlement. If a commitment to constitutionalism exists only in the Court, it is unlikely to sustain itself. The constitutional promise of the Civil War Amendments, as we have seen, could not endure without political support. As political will for constitutional principle began to flag, we witnessed a retreat from the original meaning of the Civil War Amendments and the forging of a more limited constitutional vision. Even if the Court would have acted to uphold these early acts and Congress's view of the Fourteenth and Fifteenth Amendments, it is difficult to imagine that it could have, in itself, sustained the early promise of full constitutional rights for black citizens. Contrary to so much of constitutional theory, when the Court is vested with the sole responsibility of enforcing constitutional limits, our constitutionalism is likely to be less secure, not more so.

Conclusion: The Subtle Vices of Authoritative Settlement

Even if the Court gets the Constitution wrong, proponents of judicial supremacy are fond of quoting Justice Brandeis: "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[86] Yet, they often fail to note Brandeis' subsequent sentence: "But in cases involving the Federal Constitution, where correction through legislative practice is practically impossible, this Court has often overruled its earlier

[86] *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932), Brandeis dissenting.

decisions. The Court bows to the lessons of experience and the force of better reasoning[.]"[87] Still, settlement for settlement's sake is deemed to be a higher constitutional value than constitutional principle or meaning to many proponents of judicial supremacy.[88] Morally speaking, this slights constitutional principles for the evasive value of closing constitutional questions and is difficult to reconcile with the notion that the Court will be more concerned with constitutional principle than will the political branches or the people. This seems corrosive of constitutionalism because it tells the Congress to be unconcerned with the Constitution once the Court has spoken (even if Congress thinks the Court got the Constitution wrong). But, most importantly, it is unlikely to provide for authoritative settlement in real terms. So we end up with a distorted view of constitutional meaning, as well as the evolution, distortion, and evasion of past settlements. It gives us the vices of authoritative settlement with none of the virtues.

We see just this in the Congress's debate over and passage of the Civil Rights Act of 1964, as well as the Court's upholding that Act in *Heart of Atlanta Motel* and *Katzenbach v. McClung*. And it is *The Civil Rights Cases* of 1883 that loom so large in this debate. As we have seen, *The Civil Rights Cases* held that Congress may not reach private discrimination under section 5. Given that this decision had not been overturned, even if the Court had

[87] Ibid. at 407-408.

[88] Alexander and Schauer, "On Extrajudicial Constitutional Interpretation," 1371.

limited its reach and some members had clearly rejected it[89]—many in Congress and the Kennedy (later Johnson) Administration were reluctant to rest Title II of the Civil Rights Act of 1964 on Congress' section 5 power, as Title II prohibited racial discrimination in public accommodations, much as the Civil Rights Act of 1875 had done. If the *Civil Rights Cases* had settled constitutional meaning, Title II was unconstitutional if it rested on the Fourteenth Amendment. To get around this settlement Congress and the Administration advanced the argument that Congress could reach private discrimination in public accommodations by way of the Commerce Clause rather than by way of the Fourteenth Amendment. This move was all politics: Congress rested the Civil Rights legislation on the Commerce Clause because it thought the Court would uphold it, not because it thought it was regulating interstate commerce. The ironies abound. Everyone knew Congress was regulating civil rights, but insisted that it was regulating interstate commerce because of a past Supreme Court opinion that many thought had been wrongly decided.[90] Many members of Congress were willing to take a principled constitutional stand on civil rights, but were precluded from doing so in order to adhere to Supreme Court precedent. Yet, Title II of the Civil Rights Act and the Supreme Court opinions that upheld it were not consistent with the *Civil*

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[89] The state action limitation doctrine was itself altered by Supreme Court opinions. Moreover, in *Bell v. Maryland* several members of the Court were prepared to reject the *Civil Rights Cases* out right. Constitutional doctrine was in the process of evolving on the Court—surely in relation to political changes—and was not simply held stable.

[90] Congressional politics played a part as well, as the legislation was shifted to a more accommodating committee, away from southerners resistant to the legislation. Lucas A. Powe, Jr. *The Warren Court and American Politics* (Cambridge: Harvard University Press, 2000) 234-238.

Rights Cases. While they managed to get around the Supreme Court's narrow view of section 5 (limiting it to state action), the Commerce Clause argument that Title II ultimately rested upon was indirectly rejected by Bradley's opinion in 1883. There Bradley insisted that "no one will contend that the power to pass . . .[the Civil Rights Act of 1875] was contained in the Constitution before the adoption of the last three Amendments [the Thirteenth, Fourteenth, and Fifteenth Amendments]."[91] As the Commerce Clause was part of the original Constitution of 1787, Bradley rejected any notion that it gave Congress the power to reach civil rights. Now, we might think Bradley was wrong on this score, or we might say that the Commerce Clause has evolved in such a way as to outrun the past decision,[92] but either way we are evading the logic of the *Civil Rights Cases* even while engaging in the pretence of upholding them.

In a rare moment of lucidity, Counsel for the Heart of Atlanta Motel said what everybody knew: "the argument of counsel [Archibald Cox] and of the government that this is done to relieve a burden on interstate commerce is so much hogwash; that the purpose of Congress was to pass a law [by] which some way or another they could control discrimination by individuals in the United States."[93] The redoubtable Archibald Cox, as Solicitor General arguing

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[91] *Civil Rights Cases* at 10.

[92] The Court's Commerce Clause jurisprudence itself had undergone a fundamental transformation since Bradley's opinion, culminating in *United States v. Darby* and *Wickard v. Filburn*. For a discussion of these changes, see Barry Cushman, *Rethinking the New Deal Court* (New York: Oxford University Press, 1998) and Edward White, *The Constitution and the New Deal* (Cambridge: Harvard University Press, 2000).

[93] Richard Cortner, *Civil Rights and Public Accommodations: The Heart of Atlanta and McClung Cases* (Lawrence: University Press of Kansas, 2001) 115.

the government's case, refused to touch the section 5 argument, insisting that Title II was nothing but a regulation of interstate commerce. In its opinions upholding the Act, the Court indulged this fiction: it felt it unnecessary to reach the Fourteenth Amendment argument as the Commerce Clause provided solid constitutional footing. Out of a feigned respect for Court precedent, the Court and the Solicitor General perpetuated a constitutional fiction. Just how is this supportive of constitutionalism and constitutional principles? This gives us a distorted view of constitutional meaning that is not even in line with past settlement. So it is difficult to say, yet again, that the Court acts in a more principled constitutional fashion than the Congress, or that it provides for more stable settlement than the political branches. Perhaps most importantly, the promise of the Civil War Amendments was only realized when Congress took action: in this Congress acted to protect constitutional rights. And while this time Congress' action was upheld by the Court, it was done on the somewhat dubious grounds of Congress's commerce power.

The consequence is that the current Court has persisted in a narrow reading of Congress's power under the Fourteenth Amendment and claimed that it alone speaks for the Constitution. In *City of Boerne v. Flores* and most recently in *United States v. Morrison*,[94] the Court rejected Congress' ability to enforce its reading of constitutional rights and, in doing so, rested its opinion in part on the *Civil Rights Cases* of 1883. (I will examine these cases in far more depth in Chapter 5.) And this, even after a series of Warren Court cases

[94] *United States v. Morrison*, 529 U.S. 598 (2000).

went some way to rejecting the logic of the *Civil Rights Cases*.[95] Again, this should lead us to be skeptical of claims that the Court provides for stable constitutional meaning by adhering to its precedents. Kennedy's opinion in *Boerne* is most remarkable as it insists that the Court is the principled preserver of constitutional meaning—without offering evidence for this sweeping proposition.[96] Oddly, though, *Boerne* struck down an act of Congress that went out of its way to protect the rights of religious minorities—The Religious Freedom Restoration Act (RFRA).[97] In its place the Court offered a far narrower view of constitutional rights. If we compare congressional debates over RFRA with the Court's opinion in *Boerne*, it is not at all clear that the Court is in fact a more principled defender of the Constitution than the Congress. And, yet again, Court opinions do not provide any more stability for constitutional meaning than Congress. Court opinions in these cases evolve and change as much as congressional attitudes (if not more). RFRA was passed, after all, because the Court had offered a new reading of the "free exercise clause" and Congress (perhaps acting too deferentially)[98] was requiring the courts to return to an older reading. And while *Boerne* drew on the *Civil Rights Cases*, the reading that opinion offered

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[95] See especially *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

[96] Robert Nagel, *The Implosion of American Federalism* (New York: Oxford University Press, 2001) 92-93. And Carolyn Long, *Religious Freedom and Indian Rights: The Case of Oregon v. Smith* (Lawrence: University Press of Kansas, 2000) 227-250.

[97] One could think RFRA unconstitutional on other grounds, without rejecting Congressional power under section 5. Christopher Eisgruber and Lawrence Sager, "Congressional Power and Religious Liberty after *City of Boerne v. Flores*" *Supreme Court Review 1997* (Chicago: University of Chicago Press, 1998).

[98] Neal Devins, "Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade" 51 *Duke Law Journal* 435 (2001).

was rather different than the reading offered by the immediate Warren Court precedents, shifting, once more, constitutional meaning to the current of the Court.[99] We are, it appears, once again in a state of constitutional dialogue. The Congress appears reluctant to accept the Court's reading of section 5, as it passed the Violence Against Women Act on similar grounds as RFRA. The Court, for its part, struck down the act in *Morrison,* relying on *Boerne*. It is not clear, though, that the Congress will accept the Court's constitutional interpretation or its claim to judicial supremacy. The result, as I have argued throughout this chapter, will almost certainly depend on the political give and take between the branches of government giving us a sort of "living constitutionalism" where constitutional values are argued over and realized through political debate and not mere judicial pronouncement. This current struggle will be taken up in Chapter 5.

[99] See Powe, *The Warren Court and American Politics*, 264-265.

CHAPTER 3

PROGRESSIVE DEMOCRACY AND THE SUPREME COURT: CONSTITUTIONAL DISCONTINUITY, DIALOGUE, AND DRIFT

"Either the court must be the final arbiter of what the law is, or else some means must be found to correct its decisions. If the court is the final and conclusive authority to determine what laws Congress may pass, then, obviously, the court is the real ruler of the country, exactly the same as the most absolute king would be."—Robert LaFollette[1]

"Any citizen whose liberty or property is at stake has an absolute constitutional right to appear before the Court and challenge its interpretation of the Constitution, no matter how often they have been promulgated, upon the ground that they are repugnant to its provisions . . . When the Bar of the country understands this, and respectfully but inexorably requires of the Supreme Court that it shall continually justify its decisions by the Constitution, and not by its own precedents, we shall gain a new conception of the power of our constitutional guaranties . . . What we need is constant and unrelenting professional criticism of judicial opinions, and constant and unrelenting insistence that judicial errors of reasoning shall be judicially corrected."—Everett Abbott[2]

In the spring of 1895, the Supreme Court struck down the newly passed national income tax,[3] held that the Sherman Anti-Trust Act did not apply to a virtual monopoly of sugar manufacturing,[4] and used this very same act to uphold an injunction against a labor strike.[5] The public explosion in reaction to these cases sparked a great debate about the nature of judicial power in a democratic society. The Court was accused of

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[1] Quoted in Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner" 76 *New York University Law Review* 1383 (2001), 1446.

[2] Quoted in Charles Warren, *The Supreme Court in United States History, 1836-1918* (Boston: Little Brown, 1926).

[3] *Pollock v. Farmers' Loan and Trust Company,* 158 U.S. 601 (1895).

[4] *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

[5] *In Re Debs*, 158 U.S. 564 (1895).

defending "the propertied class" against labor,[6] of injecting its personal preferences into law, and of illegitimately usurping democratic power. Against populist views of democracy and emerging Progressive thought, the very nature of judicial review was suspect, leading to distinctly "countermajoritarian" criticisms of the Court. The period from roughly 1895 to 1925 is unique in this way, as much of the criticism of the Court took aim at its anti-democratic nature. Teddy Roosevelt captured this sentiment in his "Confession of Faith," insisting that "the first essential of the Progressive program is the right of the people to rule."[7] And Roosevelt himself was deeply critical of judges, voicing skepticism of judicial review, and, with characteristic subtlety, suggesting that judges ought to come into line with the political branches: "I may not know much law, but I do know that one can put the fear of God in judges."[8] As Barry Friedman persuasively argues, Progressive criticism of the Court, which highlighted the centrality of popular rule, was quite different from criticism of the Court that focused on its (mis)interpretation of the Constitution. During the New Deal period, as we will see in the next chapter, critics of the Court generally focused on the fact that it was misinterpreting constitutional meaning. The problem was not necessarily judicial power and independence per se—the fact that the Court was

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[6] Charles Warren, *The Supreme Court in United States History, 1836-1918*, 702.

[7] Sidney Milkis and Daniel Tichenor, "Direct Democracy and Social Justice: the Progressive Party Campaign of 1912" *Studies in American Political Development*, 8 (Fall 1994): 282-340, 329.

[8] Stephenson, *Campaigns and the Court: The Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999) 130.

overturning democratically enacted legislation—but that its interpretations were not grounded in the Constitution properly read. In the Progressive era, though, the very legitimacy of the Court was questioned. Indeed, the traditional narrative of this period paints the Court as overturning democratically enacted legislation in favor of its economic predilections. Justice Holmes' famous dissenting opinion in *Lochner* summed up this countermajoritarian critique:

> I think the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[9]

Holmes' dissent captured Progressive criticisms of judicial power in its insistence that the proper stance of the Court ought to be deference to democratic will. This critique was all the more powerful in its insistence that the Court itself was biased, a sentiment captured in Holmes' insistence that the Court's opinions rested "upon an economic theory which a large part of the country does not entertain" and culminating in his pithy aphorism: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[10]

Revisionist scholarship has made Holmes' easy insinuation—and much of the traditional narrative of a biased judiciary overturning democratically enacted legislation—problematic. It is not at all clear that

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[9] *Lochner v. New York*, 198 U.S. 45. 76 (1905).

[10] Ibid. at 75.

the Court was simply injecting its personal predilections into the law, so much as holding to traditional constitutional understandings that were themselves coming to be deeply problematic as both the states and the national government first ventured into regulating economic life.[11] Revisionists persuasively situate the so-called Lochner Court as defending the eroding constitutional order against dramatic constitutional change, and not as the lackeys of the propertied class, twisting constitutional law to suit their particular interests.[12] According to revisionists, this early understanding of the Constitution was altered in "The Constitutional Revolution of 1937," a revolution that essentially changed our fundamental constitutional commitments and abandoned the old constitutional order. Revisionist scholarship in this way is linked to a regimes' understanding of American constitutional development: it sees the old constitutional order giving way to our New Deal Constitution. Whereas traditionalist accounts see the Lochner era as a corruption of constitutional understanding and the New Deal as a restoration of John Marshall's Constitution, revisionists view 1937 as the creation of a new constitutional order with its own fundamental commitments and vision.[13]

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[11] See especially Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993).

[12] A view that even seems to be shared by Roscoe Pound in his famous "Liberty of Contract" *Yale Law Journal* (1909), where he accuses the Court of adhering to an outdated and unrealistic jurisprudence.

[13] See Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of a Living Constitution in the Course of American State-Building" *Studies in American Political Development* (1997); Bruce Ackerman, *We the People: Transformations* (Cambridge: Harvard University Press, 1998), G. Edward White, *The Constitution and the New Deal* (Cambridge: Harvard University Press, 2000), and Barry Cushman, *Rethinking the New Deal Court* (New

But for all the talk of the Lochner era and the Lochner Court, leading revisionist accounts like Ackerman's tend to focus on the constitutional struggles of the New Deal years to illuminate the rejection of the Lochner Court's Constitution and the articulation and construction of a new constitutional regime. The New Deal is seen as the centerpiece of American constitutional development. Howard Gillman's *The Constitution Besieged* is an important exception, but he focuses more narrowly on what came to be known as substantive due process, leaving out large swaths of constitutional doctrine. And while almost all accounts of constitutional change during the New Deal reach back to this period, the specifics of constitutional conflict remain unexplored. Constitutional-regime accounts of constitutional development treat the New Deal as a continuation of Progressive era constitutional conflict.

This is troublesome because there were, as Friedman notes, important differences between these periods in terms of the criticisms leveled against the Court. But, far more importantly, the period of 1895-1925 belies the notion that dramatic moments of constitutional politics result in the recreation of constitutional meaning, giving us new constitutional understandings, and that such moments of upheaval are unusual events. The discontinuities in constitutional thought during this era do not sit easily with critical realignment theory, attaching the Court to

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York: Oxford University Press, 1998). See also the exchange between Howard Gillman and Robert Lowry Clinton in *Political Research Quarterly* over the Marshall Court.

the governing coalition of the 1896 election,[14] or with a reconstructive president who fundamentally reshapes constitutional commitments.[15] While constitutional conflict may have come to a head in the early 1930s with clashes over the New Deal, and while there are obvious links between the New Deal criticism of the Court and the Progressive critique of the Court, this was a thirty year long era of constitutional uncertainty and flux: a national "debate over the content of our most fundamental commitments,"[16] but one that lingered, giving us neither a failed "constitutional revolution," a crucial constitutional moment, or a clear constitutional reconstruction.[17] Moreover, when combined with the period in the last chapter, 1870-1883, this suggests that these so-called periods of "ordinary politics" are fraught with constitutional struggle. And even if the constitutional change of 1937 does have its roots in Progressive criticism of the old Constitution, and the emergence of a "living Constitution," the story is not as simple as the Court defending the old order while the political branches and the public articulating a new constitutionalism that eventually triumphs.

This period witnessed neither an evolutionary unfolding of Supreme Court opinions that attempted to "update" our constitutional

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[14] Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker" *Journal of Public Law* (1956).

[15] Ackerman, *We the People* (1991 and 1998) and Keith Whittington, "The Political Foundations of Judicial Supremacy" in Sotirios Barber and Robert P. George, eds, *Constitutional Politics: Essays on Constitutional Making, Maintenance, and Change* (Princeton: Princeton University Press, 2001).

[16] Whittington, "The Political Foundations of Judicial Supremacy,"270.

understandings, nor a great moment of "punctuated equilibrium" that resulted in dramatic change. Here, revisionist and traditional accounts have something to teach one another, as I argue in the next chapter as well. Traditionalists, I argue, reveal that Supreme Court opinions in this period were often in conflict with one another and went back and forth in their understanding. This period was riddled with constitutional uncertainty, which, in part, is what lent credibility to charges of "judicial bias." At the same time, the traditional narrative of an undemocratic Court usurping power is difficult to sustain if we view the Court and the political branches (especially Congress) in relation to one another, as the Congress itself often invited judicial and executive construction of legislation (as with the Sherman Antitrust Act), deferring, in part, to the Court.[18]

This period witnessed the national government's first great attempt to regulate the national economy, an attempt that has come to be described as "state-building,"[19] which displaced traditional understandings of American constitutionalism. But this change in constitutional understandings occurred, by and large, through the political process, even while leaving constitutional understandings incomplete. Indeed, it is

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[17] Ackerman, *We the People* (1998).

[18] On legislative deference to the judiciary, see Mark Graber, "The Nonmajoritarian Difficulty" *Studies in American Political Development* 7. See also Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891" *American Political Science Review* Vol. 96, No. 3 (2002) (noting that various acts of Congress further extend national jurisdiction from state courts, placing the federal courts at the center of political disputes. Coincides with increase in governmental activity general, which is then being challenged in the Courts—often with the approval of Congress—so that we must see the actions of Congress to realize the Court's role here. See also Warren, 685-689.

interesting to note that during this era of constitutional activity, which witnessed four amendments to the Constitution, a period matched only by the Civil War and Founding eras,[20] the most important constitutional changes occurred not by way of formal amendment, but in the political arena. This chapter focuses on three key areas of national regulation—antitrust legislation, the regulation of railroad rates, and the regulation of labor relations—arguing that the Congress (as well as the executive at times) and the Court were engaged in a constitutional dialogue of sorts (if, at times, a contentious one) that often left constitutional meaning open or undetermined. In striking down laws passed by Congress or finding particular applications unconstitutional, the Court was often asking Congress to explain more fully the intent of the law. Congress, in turn, often qualified itself, making the constitutional basis of its actions—and the reach of the law—clearer. The Court often followed such congressional qualifications, which, at times, resulted in Court opinions that were in tension with one another. Yet, in passing legislation, the Congress itself often intentionally left ambiguous meaning to be resolved by the Court, deferring, in essence, to the Court's judgment. So even when the Court limited the reach of congressional acts, much to public dismay, it is not clear that the Court was truly thwarting congressional will and settling the constitutional issue against the Congress, as is so often

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[19] See especially, Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacity* (Ithaca: Cornell University Press, 1981).

[20] David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* (Lawrence: University Press of Kansas, 1996).

suggested.[21] On the contrary, these three areas indicate the way in which constitutional meaning is shaped by the interaction of the branches of government and, further, that the Court itself often leaves constitutional meaning in an unsettled state, working out individual cases that do not clearly follow its own precedents or theorize deeply and fully about constitutional meaning to guide the Congress and president.

The tension and uncertainty during this era, no doubt, are in part due to deep changes in legal thought, with the emergence of Roscoe Pound's "sociological jurisprudence," the Brandeis Brief, and general criticism of what has come to be dubbed "classical legal thought." Thus, as legal historian William Wiecek suggests, "the Court had established two bodies of doctrine," but ones riddled with "doctrinal inconsistencies" that could not long coexist.[22] But the shift in legal and constitutional thought occurred largely because of politics. The demand for more governmental intervention and the persistent attempt to make the Court clarify itself or reconsider its thought were a result of the political demands of the day. The reworking of constitutional thought during the Progressive era was a result of its particular politics, namely, the insistence that the government regulate the national economy, intervene on behalf the of laborer, protect the consumer, and the like, all of which required a more expansive view of constitutional authority. It is the particular historical clashes rooted in the

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[21] George Lovell, "As Harmless as an Infant: Deference, Denial, and Adair v. United States" *Studies in American Political Development*, 14 (Fall 2000) 212-233.

[22] William Wiecek, *The Lost World of Classical Legal Thought* (New York: Oxford University Press, 2001)164.

politics of the day that shaped and reworked constitutional meaning during this period, and such a reworking was based upon the political imperatives of the time.

Woodrow Wilson's great *Constitutional Government in the United States* reveals just such thinking, as it reads as an extended argument with James Madison, calling upon us to drop this archaic Newtonian Constitution—which holds us in "inactive equilibrium"—in favor of Darwinian evolution: the Constitution must change to meet the demands of the day.[23] Yet, it is not without irony that this reworking of constitutional thought occurred, by and large, through the Madisonian separation of powers. True, it did not allow for the neat "evolution" of constitutional meaning in a forward-looking—that is progressive—direction, but neither did the Madisonian Constitution hold us in "inactive equilibrium."

The Riddle of Antitrust: Congress, the Court, and the Sherman Act

In 1890 Congress passed the Sherman Antitrust Act, which made "contracts, combinations or conspiracies in restraint of trade" illegal. The Act, against growing concentration in industrial relations, was seen in part as a way of protecting the market, but has perhaps best come to be seen as a symbolic act aimed to satiate public desires for action against the "trusts" while leaving the larger meaning of the Act to be worked out by the executive and especially the

[23] Daniel Stid, *The President as Statesman: Woodrow Wilson and the Constitution* (Lawrence: University Press of Kansas, 1998) and Eldon Eisenach, *The Lost Promise of Progressivism* (Lawrence: University Press of Kansas, 1994).

courts.[24] After all, the Act was passed with virtually no opposition (one vote against it in the Senate and none in the House), casting doubt on the Act as a clear outline of antitrust policy. The Act provided the government the opportunity to take action against such restraints on trade, prosecuting the businesses, particularly the trusts, attempting to restrain trade to gain a competitive advantage or fix prices to their benefit. These cases, fleshed out over more than a decade, were among the most high-profile cases of the day, with prosecutions under the Act brought by the executive branch—much to the attention of the public and the media. Yet, while the administration had primary responsibility for bringing prosecutions, the Court was called upon to interpret the reach of the Act and its constitutional application. As the sponsor of the Act himself put it, the application "must be left open for the Courts to determine in each particular case."[25] Thus when Corwin refers to the "judicial legislation" surrounding antitrust, he is not far off the mark. It is Congress, though, that invited such policy making from the bench.[26] And, as Corwin himself notes, when Teddy Roosevelt breathed life into the government's antitrust policy, the Court overwhelmingly upheld such prosecutions and, in time, moved into line with his reading of the Act.

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[24] Donald Morgan, *Congress and the Constitution* (Cambridge: Harvard University Press, 1966) 142. See also Melvin Urofsky and Paul Finkelman, *A March of Liberty: A Constitutional History of the United States, Volume II: From 1877 to the Present* (New York: Oxford University Press, 2002) 535. Scott James argues that the act merely federalized the common law, which only limited "unreasonable" restraints upon trade, but was reinterpreted by the executive branch for largely political reasons. Scott James, "Prelude to Progressivism: Party Decay, Populism, and the Doctrine of 'Free and Unrestricted Competition' in American Antitrust Policy, 1890-1897" *Studies in American Political Development*, 13 (Fall 1999): 288-336.

[25] Graber, "The Nonmajoritarian Difficulty," 52. James notes that the Act was misnamed, as Sherman's original intent was altered by the final bill, "Prelude to Progressivism," 294.

[26] Edward Corwin, "The Anti-Trust Act and the Constitution," 282.

The Court's first foray into the field came in 1895. In what was popularly know as the "Sugar Trust Case," the government sought an injunction under the Sherman Act to prevent the American Sugar Refining Company from acquiring four competing sugar producers in Pennsylvania, which would give it control of ninety-eight percent of the sugar market in the United States. The Court's opinion in *E.C. Knight* was the first time it touched on the Sherman Act, and in an opinion for the Court with only Justice Harlan dissenting, Chief Justice Fuller found the Sugar Trust beyond the reach of Sherman Act. Fuller's opinion upheld the Sherman Act as constitutional by essentially merging it with his reading of Congress' Commerce Power. And it was his reading of the Commerce Power that led him to conclude that the Act did not apply to the case at hand. Fuller's reasoning in *Knight* drew a distinction between "commerce" and "manufacturing," insisting that the reach of the Commerce Power did not extend to manufacturing, which was traditionally reserved for the states. Thus Fuller reasoned that the Commerce Power, and by extension the Sherman Act, did not apply to manufacturing or those things that only had an "indirect" effect upon commerce. Congress, Fuller argued, did not in fact intend the Act to touch upon such areas, a reading which at least found some support in Senator Sherman's view: the Act goes "as far as the Constitution permits Congress to go, because it only deals with two classes of matters: contracts which affect the importation of goods into the United States, which is foreign commerce, and contracts which affect the transportation and passage of goods from one State to another. The Congress of the United States can go no farther than that. It is claimed by no one

that it can."[27] Moreover, Attorney General Richard Olney who argued the case, noted that "any literal application of the provisions of the statute is out of the question."[28] Fuller offered a formal distinction between "direct" and "indirect" effects on commerce that was seen as an inherent part of the Commerce Power and one that many of the Sherman Act's supporters embraced, and one even shared by Attorney General Olney.[29] Justice Harlan, in a familiar position of lone dissenter, forcefully objected to this reading of both the Commerce Power and the Sherman Act (which were one and the same in Fuller's reading). Yet the reach of *Knight*—and its seeming limitation of the Sherman Act—was itself quickly qualified in subsequent cases.

The move away from *Knight* is important, as it paved the way for far more regulation of antitrust than the opinion itself would seemingly allow and suggests a far more complex relationship between the Court, the Congress, and the executive than leaving it with *E. C. Knight* would suggest. As Owen Fiss notes, traditionalists like Alan Westin end the discussion with *Knight,* giving credence to such claims that the Court was willfully anti-democratic and bent on curbing congressional power against any kind of economic regulation.[30] But antitrust does not end with *Knight;* indeed, the Court almost immediately qualified its broad and deep construction of the Commerce Clause.

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[27] Morgan, *Congress and the Constitution*, 144.

[28] James, "Prelude to Progressivism," 313.

[29] Ibid. 154-155.

[30] Owen Fiss, *The Troubled Beginnings of the Modern State* (New York: MacMillian, 1994) 114. See also Alan Furman Westin, "The Supreme Court, The Populist Movement and the Campaign of 1896" *The Journal of Politics*, Volume 15, Number 1 (1953). This is true, too, of Donald Grier

The Court's opinions that immediately followed *Knight* in the spring of 1895, though, lent credence to Westin's claims that it was manipulating constitutional meaning to protect the propertied class against ordinary citizens. First, in *Pollock*, the Court held that a national tax on incomes over $4,000 (less than one percent of the population at the time) was an unconstitutional "direct" tax.[31] The *Pollock* opinion caused far more of a public opinion storm than *Knight*, as it was seen to run counter to Supreme Court precedents—one dating back to the Founding generation—that suggested such a moderate tax was constitutional. While the Court did not explicitly overturn these precedents, its attempt to distinguish them from earlier cases was unpersuasive. The Democratic Platform in 1896 even went so far as to say that not only was "Pollock in error, but that it departed from previous rulings issued 'by the ablest judges who have ever sat on that bench.'"[32] While *Pollock* itself is beyond the scope of our analysis, it should not escape notice that its uneasy relationship to past precedent and the peculiar circumstances under which the opinion itself was rendered—where the switch of

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Stephanson Jr., *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999) 117.

[31] In Pollock I the Court stuck down a section of the income tax provision of Wilson-Gorman Tariff Act of 1894, distinguishing between a tax on income and a tax on real estate, which he equates with a direct tax and, therefore, read it as unconstitutional. Attorney General Olney petitioned for a direct rehearing, suggesting the executive branch did not buy the Court's opinion and sought to change it immediately (Fiss, 97). In Pollock II (1895) the Court stuck down all provisions of the income tax, but in doing so, seemingly rejected early Supreme Court opinions—*Hylton v. United States* (1796) and *Springer v. United States* (1881)—thus revealing how the judiciary does not always follow its own precedents and putting the lie to the notion that it alone can provide stability. Moreover, the Court, under pressure from Congress, public opinion, and the President upheld a similar tax on corporations in *Flint v. Stone Tracy Company* (1909) prior to the enactment and ratification of the 16th Amendment (which, of course, made the income tax constitutional). Moreover, the switch in votes (and reasoning) from Pollock I to II occurred in the very same year! How is this authoritative settlement? (Fiss 77).

[32] Stephenson, *Campaigns and the Court*, 126.

a single justice changed the outcome in such a far reaching case—should lead us to be skeptical of easy claims of judicial stability against the political fluctuation of the Congress.

Perhaps even more important was *In re Debs*, where the Court upheld an injunction against the Pullman Strike. Under the leadership of Eugene V. Debs, the American Railway Union staged a strike against any train carrying a Pullman car. The strike crippled rail transportation and United States Attorney General Olney sought an injunction under the terms of the Sherman Antitrust Act, calling the strike a "conspiracy" and "combination" to hinder trade. Adding to the appearance of bias in favor of capital and against labor was the fervor with which Olney prosecuted Debs, a fervor that was not as readily apparent in his argument before the Supreme Court that very term in *E. C. Knight*. Indeed, Olney himself voted against the Sherman Act while a member of Congress and expressed deep skepticism of the law, writing to a friend that he believed both the income tax and the Sherman Act "to be no good."[33] The Supreme Court upheld the injunction, leading Westin to note with superb irony that this was the government's "first successful *criminal* prosecution based upon the Sherman Act. The Supreme Court thus struck down not the oil trust, or the sugar or beef or steel trusts, but the *union trust*[.]"[34] Westin overstates his case, as Justice Brewer's opinion for the Court did not, in fact, uphold the injunction based on the Sherman Act—even though it did not distance itself from the lower court, which did—but on the constitutional

[33] Westin, 27. See also Stephenson, 119.

[34] Ibid.

grounds that the state must be able to preserve order.[35] Westin, though, is surely right in noting the uneasy—perhaps even contradictory—notion of national power within the Court's opinions. In *E. C. Knight*, the Commerce Power could not intrude into the realm of manufacturing, which was constitutionally reserved for the states, no matter how much it might affect interstate commerce, while in *Debs*, national power to put down a labor strike was seen to be extensive, even if its constitutional foundation was not clearly articulated.[36] The reach of national power under the Sherman Act continued to riddle the Court, which, in turn, engaged Congress.

In three cases shortly after *E. C. Knight*, the Court upheld prosecutions under the Sherman Act that, as Fiss argues, helped pave the doctrinal foundations for Teddy Roosevelt's more aggressive "trust busting" and are not easily squared with *Knight*.[37] In *Trans-Missouri* and *Joint Traffic*, the Court upheld applications of the Sherman Act to railroads openly engaged in price-fixing agreements with one another.[38] The railroads contested that the right to engage in such price-fixing arrangements was part of their right to contract and therefore precluded the government from intervening against them. In the Court's opinion in both *Trans-Missouri* and *Joint Traffic*, Justice Rufus Peckham, most famous for upholding "liberty of contract" in *Lochner*, fell into line with the government's position that the Sherman Act applied to all "restraints on trade," including contracts to limit

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[35] *In re Debs* at 599.

[36] John Semonche, *Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920* (Westport: Greenwood Press, 1978) 218.

[37] Fiss, *Troubled Beginnings*, 119-121.

trade, adopting a per se reading of the Act.[39] In part, Peckham's opinion was distinguished from *E. C. Knight* in that the railroads were clearly engaged in transportation—a form of commerce—and thus fell within *Knight's* distinction between "commerce" and "manufacturing." And Peckham even invoked a notion of "direct" and "indirect," noting that price-fixing schemes had a "direct" impact on interstate commerce and therefore clearly fell within the terms of *Knight*. Yet, a question remained that sat uneasily with another emerging line of constitutional thought, articulated in *Allgyer* and the soon-to-be decided *Lochner* case: what justified the intrusion into "liberty of contract" here? Peckham's answer was that the railroads were different. As the "highways of the nation" they were uniquely affected with a public interest, marking them off, say, from bakers, and thus allowing governmental regulation in ways that would not be extended to other industries. The very next year, though, *Addyston Pipe* brought this logic into doubt.[40]

In this case, six manufacturers of cast iron pipe colluded together to fix-prices, deemed necessary, as in the two railroad cases above, to prevent ruinous competition. Peckham again wrote for the Court, only this time he commanded a unanimous Court. The opinion upheld the government's action, but in order to do so it had to get around *E.C. Knight* and expand upon *Trans-Missouri* and *Joint Traffic*. Following the logic of *Knight*, the pipe manufactures would seem to fall

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[38] *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1896) and *United States v. Joint Traffic Association*, 171 U.S. 505 (1898).

[39] See James, "Prelude to Progressivism" arguing that the government's reading of the Sherman Act was based on the electoral politics of 1896.

[40] *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899).

under the distinction between "commerce" and "manufacturing" (they were, after all, making goods) and therefore not come under Congress' Commerce Power or the Court's reading of the Sherman Act. As Fuller had reasoned there, "Commerce succeeds to manufacture, and is not a part of it."[41] He went on:

> Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and transportation incidental thereto constitute commerce. If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate . . .every branch of human industry.[42]

In *Addyston*, Peckham held that "certain kinds of private contracts . . . directly, as already stated, limit or restrain, and hence regulate interstate commerce . . . ."[43] Private companies could not take up this governmental function, one that Congress had legitimately taken up in passing the Sherman Act:

> The power to regulate such commerce, that is, the power to prescribe the rules by which it shall be governed is vested in Congress, and when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent and to the same extent trenches upon the power of the national legislature and violates the statute.[44]

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[41] *E.C. Knight* at 12.

[42] Ibid. at 14.

[43] *Addyston* at 229.

[44] Ibid. at 241-242.

While this logic might technically get Peckham around *E. C. Knight*, it showed the Court's formal distinction between "commerce" and "manufacturing" to be somewhat capricious—and raised grave concerns about the stability of the Court's doctrine. As Harlan had insisted, dissenting in *E. C. Knight*, why should we close our eyes to the fact that a virtual monopoly on the manufacture of sugar is, ineluctably, going to have an impact on its sale in interstate commerce?[45] Surely such a concentration of power affected commerce as much as the price-fixing scheme in *Addyston*. Peckham's logic in *Addyston* shares more with Harlan's dissent in *Knight* than Fuller's majority opinion—yet, perhaps oddly, both justices joined it. Indeed, Peckham at one point in the opinion seemed to suggest that Congress' Commerce Power was plenary: "The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself."[46] Such a reading was clearly inconsistent with *Knight*. And, just as surely, Peckham's opinions seemed to expand the logic of *Trans-Missouri* and *Joint Traffic* in narrowing the notion of "liberty of contract." In these two opinions, governmental power to limit liberty of contract was due to the nature of railroads being affected with a public interest. In *Addyston*, the Commerce Clause itself was deemed to limit the right to contract (whether affected with a public interest or not).

Addyston, then, seemed to pave the way for a far more expansive regulation of antitrust than *Knight* or even the later railroad cases. And Teddy

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[45] *E. C. Knight* at 44.

Roosevelt began a highly public campaign to enforce the Sherman Act most notably bringing a suit to prevent the merging of the Great Northern and Northern Pacific Railroads in *Northern Securities*.[47] This 1905 case, combined with another, *Swift & Co. v. United States*, reopened the reach of the Sherman Act and the Commerce Power, leaving it unclear whether the newly decided trio of cases above were still good law.[48] In *Northern Securities*, the Northern Securities Holding Company was created under charter in New Jersey—known often as the "traitor state" for its loose corporation laws—for the express purpose of merging these two railroads and, thereby, putting an end to competition between them. So was this a "combination in restraint of trade" under the terms of the Sherman Act? In its brief before the Court, the government cited these earlier cases, but also spoke of the commerce power in nearly plenary terms: "Congress can regulate anything and everything in the sense that it can prohibit and prevent its use in a way that will defeat the law that Congress may constitutionally enact," citing *Champion v. Ames* and going on to argue that "the 'penetrating and all-embracing' nature of this power has often been stated, explained, and emphasized by this Court. *Gibbons v. Ogden*."[49] The Court upheld the government's application of the Act, but split on the reasoning, leaving the state of antitrust (and the meaning of the Commerce Clause) in disarray. Harlan's opinion for only four

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[46] *Addyston* at 228.

[47] *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

[48] And *Swift & Co. v. United States,* 196 U.S. 375 (1905) itself seemed at odds with *Hopkins v. United States* (1898), which limited Congress' power to regulate interstate commerce on stockyard sales of out-of-state cattle, not seeing this movement as part of the flow of interstate commerce.

[49] At 305. The government's brief referred to *E.C. Knight* once, but only to note that the action here had a direct affect on interstate commerce (at 315).

justices sat with the logic of the government's position, as well as *Trans-Missouri*, *Joint Pipe*, and *Addyston*, even if it threw off some of the limitations in Peckham's opinions. Harlan reasoned that the combination of these two railroads would have a direct impact on interstate commerce, limiting competition and necessarily operating as a restraint upon interstate trade. Not only did this bring the action under the Sherman Act, for Harlan, much as he had argued in *E. C. Knight*, it was the impact upon commerce (not the distinction between commerce and manufacturing) that was central to governmental power under the Commerce Clause. Justice White dissented on just this issue.

White suggested this case did not fall under the Sherman Act or the Commerce Clause, because it was not, properly speaking, a railroad case, but a stock case. The Northern Securities Holding Company had acquired the railroads in a stock swap, and while this might have an "indirect" effect upon commerce, the action itself was properly regulated by the states and not by Congress. In this, White adhered to the distinction of *E. C. Knight*, suggesting that to allow Congress to reach all such transactions would throw of all limits on the Commerce Power and intrude on the constitutionally reserved powers of the states in the Tenth Amendment. White thus clung to a formal distinction that Harlan rejected: "there was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. It was, in form, such a transaction, it was not, in fact, one of that kind."[50] For Harlan, behind the formality of a stock acquisition, it was a combination in

[50] Ibid. at 353-354.

restraint of trade: the company was created, Harlan pointed out, for this very purpose and no other. The Court could not ignore this fact, and the inevitable restraint on trade made the Sherman Act applicable. Here, too, White disagreed. Drawing on his dissenting opinions in *Trans-Missouri* and *Joint Traffic*, White reasoned that the Sherman Act did not apply to all restraints on trade, but only "unreasonable" restraints on trade. In all of these railroad cases (though Northern Securities need not go so far as it was not about trade) the agreements leading to restraint on trade were made to preserve the industry and bring order to the market: they were thus reasonable restraints on trade, permissible under this construction of the Sherman Act (and Commerce Clause)—a reading that finds at least some footing in the legislative record, referring to the common law and "reasonable" against "unreasonable" restraints on trade, and one that the Cleveland Administration had partly embraced.[51]

Justice Brewer held in favor of the government, but wrote a separate concurrence rather than joining Harlan's opinion and agreed with White's construction of the Sherman Act. This was a construction, in fact, that Roosevelt partly shared, though Attorney General Philander Knox argued that "the words in restraint of trade as used in the act extend to any and all restraints whether reasonable or unreasonable, partial or total[.]"[52] But Brewer, like Roosevelt, saw the Northern Securities Holding Company as an "unreasonable" restraint on trade.[53]

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[51] Morgan, *Congress and the Constitution*, 140-159.

[52] *Northern Securities* at 301.

[53] Ibid. at 363.

The multiplicity of opinions in *Northern Securities*—and the tension in their logic—offered the government little guidance on the meaning of the Commerce Power. But the Court, as it did in the earlier cases, essentially came into line with the government's reading of the Act. Even so, it was unclear whether the Sherman Act applied to all restraints on trade or only unreasonable restraints on trade. Shortly after the decision, the Roosevelt Administration brought suits against Standard Oil and the American Tobacco Company that were as publicly visible as the Northern Securities suit had been. Moreover, Roosevelt saw the Sherman Act as applying to contracts, combinations, or conspiracies that lead to unreasonable restraints on trade, which would be determined by the government under the reach of the Commerce Power, departing from earlier readings of the Act. Restraints on trade that were reasonable, that brought order to the market and were deemed to be in line with the public interest, were not impermissible under the terms of the Act. Arguing before the Court, the government itself suggested if the Act were so constructed, it would still apply to this case.[54] For Roosevelt, this should be determined on a case-by-case basis by the executive branch, but such an approach required an *ad hoc* approach from the Court as well, leading to a "patchwork of often conflicting opinions" as the details were worked out.[55] The Taft Administration continued the suits and adhered to

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[54] American Tobacco at 112. A brief partly written by James McReynolds, who would later join the "four horsemen" in drawing formal distinctions about the commerce clause, distinguished the case at bar from *E.C. Knight* and even called for a practical, case by case, evaluation of interstate commerce.

[55] Loren Beth, *The Development of the American Constitution* (New York: Harper and Row, 1971) 141. There is a question of whether TR's reading was consistent with the original terms of the Sherman Act, but it certainly shows that the Act itself left this discretion to the executive branch by relying on it, through the courts, to enforce the Act's terms. See Richard Wagner, "A Falling

the distinction between unreasonable and reasonable restraints on trade as well, a reading of antirust which Taft himself had articulated as a circuit judge in the *Addyston* case. In *Standard Oil* and *American Tobacco*, the Court, under opinions by Chief Justice White, recently elevated to the seat by Taft, came into line "with the outlook evolving in public opinion at large, as reflected in Theodore Roosevelt's recommendations on the trust question."[56] Indeed, it is remarkable how the Court opinions themselves track perfectly with each Administration's construction of the Sherman Act, leading Scott James to "see judicial acquiescence to the more political branches of government" in these various Court opinions.[57] White's opinion announced what came to be known as the "rule of reason," which was first articulated in his dissents in *Trans-Missouri* and *Joint Traffic* and was the basis of Brewer's concurring opinion in *Northern Securities*. On this issue of whether the government could reach a holding company under the terms of the Act (which, again, embraced the Commerce Clause), White abandoned his dissents in these cases, which had adhered to the federalism distinction between commerce and manufacture, permitting the government to regulate all unreasonable restraints on trade, even those that would, in the language of Fuller's *Knight* opinion, only "indirectly" affect commerce. But, much like Fuller had done in *Knight,* White read the Sherman Act as embracing the Commerce Clause, insisting that there was no "right" to engage in a contract

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Out: The Relationship Between Oliver Wendell Holmes and Theodore Roosevelt" *Journal of Supreme Court History* Vol. 27 No. 2 (2002).

[56] Kelly, Harbison, and Belz, *The American Constitution*, 422. *Standard Oil Co. v. United States*, 221 U.S. 1 (1910) and *American Tobacco Co. v. United States*, 221 U.S. 106 (1911).

[57] James, "Prelude to Progressivism," 292.

to "unreasonably" restrain trade. Thus there was no legitimate liberty objection to Congress' regulation—under the Commerce Power—of an unreasonable restraint on trade. Much like in *Northern Securities*, the government sought to prevent a holding company that would, inevitably, restrain trade and competition. Once more, the Court came into line with the Administration's position. This brought some settlement to the area of antitrust—with the Court conforming to the political branches' view—but it seemingly left the *E. C. Knight* reading of the Commerce Power a relic of history.

The opinion, though, only settled the meaning of the Sherman Act, while the reach of the Commerce Clause—and the applicability of *Knight*--was left unclear. Could the government reach any such restraints that had an impact on interstate commerce (thus marginalizing *E. C. Knight*), or only those that were part of commerce itself (thus adhering to *Knight's* distinction between commerce and manufacture)? The unsteady tension was compounded by the Court's earlier unanimous opinion in *Swift*, where it upheld that a combination of meatpackers came under Congress' Commerce Power, as their activities, Holmes reasoned for the Court, were within "the current of commerce." The current of commerce theory was utterly at odds with *E. C. Knight's* formal distinction between manufacturing and commerce, as well as its insistence that Congress may only reach those things that have a "direct" rather than "indirect" affect upon commerce. Two other cases from these years, the Lottery Case and oleomargarine case, also sit uneasily with *E. C. Knight* as they seem to countenance the Commerce Clause as a sort of federal police power, which was flatly rejected in

Knight.[58] The oleomargarine case is especially troublesome as it upheld an extensive congressional tax on yellow-colored margarine (a tax that was hard to read as a revenue measure, as uncolored margarine was barely taxed), which entered the forbidden territory of manufacture if *Knight's* reasoning prevailed.[59] Indeed, the fact that the Commerce Clause was not the equivalent of a federal police power was at the root of all the Sherman Act cases, putting these two cases at odds not only with *E. C. Knight*, but the latter cases as well. This move away from *E. C. Knight* would not have been so troublesome if it had merely been discarded. But it wasn't. Throughout this period, the Court never reconciled the "current of commerce" theory with the logic of *E. C. Knight*, even while it drew on both strands of thinking.[60]

This has led Robert McCloskey to observe "that the Constitution forbids those departures from laissez faire that the Court disapproves, and permits those departures from laissez faire that the Court thinks reasonable and proper. And obviously this is not a legal "rule" in any understandable sense of the word, but a statement of policy, or rather an assertion of the power to determine it."[61] And he went on to note that this seeming inconsistency makes it "harder and harder to sustain the illusion that the judicial yes or no is based on inexorable constitutional commands, and it becomes easier and easier for observers to see that judicial

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[58] *Champion v. Ames,* 188 U.S. 321 (1903) and *Mcray v. United States*, 195 U.S. 27 (1904), as well as opinions upholding the Pure Food and Drugs Act of 1906 (*Hipolite Egg Co. v United States*, 220 U.S. 45 (1911)) and the Mann Act (*Hoke v. United States*, 227 U.S. 308 (1913)).

[59] Beth, *The Development of the American Constitution*, 156.

[60] *Hammer v. Dagenhart*, 247 U.S. 251 (1919).

[61] McCloskey, *The American Supreme Court*, 100.

review is operating as a subjective and quasilegislative process."[62] This was, in fact, just the charge that was leveled against the Court by Progressive critics. While the justices may not have been as sinisterly political as traditional accounts suggest, constitutional meaning was in a state of drift and disarray. Caught between new conceptions of constitutional government and the old constitutional order, the Court was often at sea, offering little guidance to the political branches in articulating and settling constitutional meaning. Yet the political branches too altered their reading of the Sherman Act and at times turned to the Court to work out uncertain constitutional questions, adding to this constitutional flux and drift, even while engaging in a sort of constitutional dialogue. When the Court, for example, clearly applied the Sherman Act to labor,[63] Congress responded with the Clayton Act in 1914, which partly exempted labor from antitrust, stating that "labor . . . is not a commodity or article of commerce." Yet how far-reaching the exemption was is not so clear, as Congress, once more, invited the courts to sort this out, both as to what was "lawful" activity and specifically permitting courts to issue injunctions if necessary to "prevent irreparable injury to property, or to a property right."[64] When the Court upheld a labor injunction under the terms of the Act, both Pitney's opinion allowing an injunction given this particular case and Brandeis' dissent, denying the injunction's validity, were plausible readings

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[62] Ibid.

[63] *Loewe v. Lawlor,* 208 U.S. 274 (1908)

[64] Wiecek, 160. Corwin, "Anti-Trust," 286, Lovell, 112.

given the Act's ambiguity.[65] This back and forth persisted in the clash of politics without resolution and, at times, with stunning inconsistency, as when the Court struck down the Child Labor Act of 1916, citing the formal distinctions between commerce and manufacturing articulated most fully in *E. C. Knight*, which, seemingly abandoned, were dusted off and offered anew in *Hammer v. Dagenhart* in 1918.[66] Congress then re-passed a child labor law under its power to tax, which the Court struck down as well.[67] Chief Justice Taft first drew on *Hammer's* Tenth Amendment argument, saying that Congress could not, by indirection, reach the powers of the states, and, secondly, distinguished this tax from the oleomargarine tax the Court had upheld. Congress could prohibit the movement of goods in interstate commerce by way of a heavy tax if the goods themselves might be deemed "unhealthy," but if the products themselves were safe—the evil here was child labor—then Congress could not use its power in such a fashion. Oddly, even Holmes joined Taft's opinion, though in his dissent in *Hammer* he took issue with the Tenth Amendment argument and even cited the oleomargarine case as justifying the Congressional regulation of child labor. We see a similar drift and dialogue, if more vividly, in the government's establishment of the Interstate Commerce Commission.

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[65] *Duplex Printing v. Deering*, 254 U.S. 443 (1921). See Ken Kersch, *Discontinuous Development in American Constitutional Law: Civil Liberties and Civil Rights in the Twentieth Century* (New York: Cambridge University Press, Forthcoming) 236.

[66] Day tried to distinguish from the likes of the oleomargarine case, by saying that Congress could prevent harmful goods from moving in interstate commerce, but not goods that were, in themselves, unharmful—and nothing about the products produced with child labor was harmful per se. See Walter Murphy, *Congress and the Court: A Study in the American Political Process* (Chicago: University of Chicago Press, 1963).

The Reach of the ICC: Constitutional Dialogue

The Interstate Commerce Act of 1887, establishing the Interstate Commerce Commission, was the first national attempt to regulate the railroad industry and did so by way of an administrative agency, which was novel at the time. Traditional accounts suggest that this first attempt at national administration was thwarted by a hostile Court that severely circumscribed the ICC's power, just as it deliberately distorted the Sherman Act to make it toothless. Yet Congressional intent in establishing the ICC, much like antitrust, was not perfectly clear and, indeed, allowed Congress to avoid hard choices by creating an administrative agency with vague guidelines, which invited the courts to enter the arena. As one scholar noted, "Congress was not troubled by the Court's railroad decisions and showed little inclination to strengthen the ICC during the 1890s."[68] But when the Congress did make its intent clear, often against past Supreme Court opinions, the Court often followed suit. In fact, the ICC itself was established against a Court opinion that limited state regulation of railroad rates to intrastate travel, therefore making clear that interstate rate regulation would require national regulation.

The Court, though, was itself in the midst of working out constitutional doctrine that is at odds with revisionist accounts that reflect a coherent structure of constitutional thought during this period, or the notion of a clearly delineated constitutional regime. That's not to say that there was not a central notion of legal

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[67] *Bailey v. Drexel Furniture Company*, 259 U.S. 20 (1922)

[68] James Ely, *The Supreme Court under Chief Justice Melvin Fuller* (Columbia: University of South Carolina Press, 1998) 92.

thought during this period, but that this structure of thought itself was fraught with tensions and discontinuities that needed to be worked out, often leaving constitutional doctrine at odds with itself. In Gillman's apt phrase, the Constitution was besieged during this period. But, as I noted at the beginning of the chapter, we should remember that this was a thirty-year long struggle. While this constitutional struggle culminated in the Constitutional Revolution of 1937, given the unsettled and drifting nature of constitutional thought for over thirty years, it is hard to see the New Deal era as a unique constitutional moment: a rare instance of constitutional politics amidst the norm of constitutional settlement. This is clearly evident in the realm of rate regulation as the Court maintained, at best, an uneasy relationship to its own hallowed precedent, the 1877 case of *Munn v. Illinois*.[69]

In *Munn*, Chief Justice Waite had insisted that, as railroads were cloaked with a public interest, the judgment of setting rates—particularly the notion of whether such rates were "reasonable" or not—was to be made by the legislature, not the Court.[70] Indeed, Waite insisted that for relief of laws we disagreed with, the proper remedy was to "resort to the polls, not to the courts."[71] While the regulation in this case was a state regulation, the logic of determining the reasonableness of rate regulation—whether set by the states or the ICC—would become a key question over the next several decades. *Munn* itself was severely

[69] *Munn v. Illinois*, 94 U.S. 113 (1877).

[70] Munn specifically dealt with setting rates for storage in grain elevators, which were held next to the railroad, but it upheld the logic of the states setting rates if the industry was clothed with a public interest. The Court did uphold rate regulation of fares in *Peik v. Chicago &N. W. R. Co* 94 U.S. 164 (1877).

[71] *Munn* at 134.

limited, just over a decade later, by a Court decision holding that rate regulation could not be vested with administrative bodies as a last resort: that either the legislature itself must determine rates or the administrative agency must allow for judicial review to determine the "reasonableness" of the rate.[72] The Court spun this logic out more fully in a series of ICC cases in the 1890s.

In *ICC v. Cincinnati, New Orleans, and Texas Pacific Railway Company*, Justice Brewer rejected the ICC's claim that it had the power to fix rates under the 1887 Act, noting that "there is nothing in the act fixing rates." Vesting the commission with such a power could not be construed by the terms of the Act and the Court declined to extend it so far.[73] Although, in fact, the ICC itself did not argue that it had such a power "in the sense that the state commissioners or railways are authorized by their legislatures to establish general rates for all classes and for all railway[.] We make no such claim." The ICC went on to say, "it is the exertion of no general power to prejudge or to fix rates, nor is it the exertion of any power to fix rates in general[,]" but the power to remedy cases on a specific basis when it deems those rates to be unreasonable.[74] Still, the Court noted that the Act prohibited "unjust discrimination in rates," prohibited undue and unreasonable preference, and prohibited railroads from charging more for short runs than for long runs. While the Commission might have the power to enforce the terms of the Act, that did not give it the power to set rates, nor did it give it the final say in construing the statute. Indeed, the Interstate Commerce Act

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[72] *Chicago, Milwaukee, and St. Paul Railroad Company v. Minnesota*, 134 U.S. 418 (1890).

[73] *ICC v. Cincinnati, New Orleans, and Texas Pacific Railway Company* 167 U.S. 470, 501 (1896).

had explicitly exempted *intrastate* shipments from the terms of the Act and the reach of the Commission, with Congress itself explicitly adhering to the Court's reading of its Commerce Power. In *Cincinnati, New Orleans*, the 1887 Act was construed in a way to protect the market, much as the Sherman Act was in this same period, and therefore only aimed at "unreasonable rates," a word of art, subject to judicial determination.

This reading seemed consistent with Congress' interest in preventing "ruinous competition" among the railroads and bringing some order to rates in interstate travel, a tactic the railroads themselves favored. True, the railroads favored this move in part because they preferred national regulation to state regulation, but this also suggests a key difference between congressional action and state action: the interests of each were different. The states had little interest in protecting the market as such, or ordering competition, but wanted to bring rates into line with state interests, which were often at odds with national interests. Thus, when the Court struck down state laws regulating railroad rates, it was not thwarting national public policy. In fact, Congress itself seemed to invite this judicial determination, as, at first, it did not attempt to regulate intrastate rates, and its legislation followed the Court's ruling in *Wabash*, adhering to the distinction between interstate and intrastate regulation.[75] Even when Congress finally stepped into this realm, as I will take up below, it did so for reasons often

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[74] Ibid. at 486.

[75] *Wabash, St. Louis & Pennsylvania Railroad Co. v. Illinois*, 118 U.S. 557 (1886).

at odds with state regulation, in the name of a national market, but even here Congress often called forth judicial determinations of "reasonable."[76]

It was on just this issue of "reasonableness" that the Court and the ICC clashed. In *ICC v. Alabama Midland Railway*, the ICC once again insisted that it was not making a general claim to set rates; it did, however, insist that it was vested with the power to say what was "reasonableness and unreasonableness, justice and injustice, preference, advantage, and prejudice, disadvantage"[77] under the terms of the Act. These were terms the Commission was competent to determine, as it was vested with the power of construing and enforcing the statute, which, "Congress has adequately provided for[.]"[78] The Court's construction of "reasonable" regulation in *Alabama Midland Railway*, which rejected the ICC's claim, was also plausibly in line with the nature of congressional acts.[79] Acting under the long haul/short haul provision, the ICC had ordered the railway to cease charging a greater rate for a shorter distance of travel (thus charging the shipper a higher rate for a shorter distance). Turning to section 4 of the Act, which prohibited differential charging "under substantially similar circumstances and conditions for a shorter than a longer distance over the same line," the Supreme Court struck down the order, rejecting the ICC's construction of the statute and insisting that the Act itself allowed for lower rates for longer distances (or higher rates for shorter distances) if it was required by competition. The Court's reading

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[76] Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge: Harvard University Press, 1991).

[77] This insistence repeated, almost verbatim, the ICC's argument in *Cincinnati, New Orleans* (at 159-160).

[78] At 161.

emphasized the "substantially similar circumstances," noting that more remote shipping destinations, even though shorter, might be serviced by only a single carrier, justifying a higher cost.[80] In this, the Court once more read the act as essentially "market reinforcing." Moreover, the Court pushed this in insisting that courts hearing appeals from the ICC were not tied to the factual findings of the Commission, which allowed courts to investigate and weigh the facts of the case on their own—further highlighting the Court's move to determine notions of "unjust" and "discriminatory" rates, and even articulating a "fair rate of return," which it then got bogged down in articulating just what this constituted.

In these cases, the Court was surely shifting from the constitutional framework laid out in *Munn*, which essentially said that such questions were properly left to the legislature and not the Court. While *Munn* was not explicitly overruled, the Court was articulating a logic that was at odds with Waite's venerable precedent and working to undermine it. Yet, viewed against congressional action, it's hard to say that the Court was simply thwarting popular policy. The Interstate Commerce Act itself invited judicial interpretation in its very ambiguity and was very likely "designed more to placate antirailroad agitation than to establish strict control over the roads."[81] And in *Cincinnati, New Orleans*, the Court had extended an invitation to Congress to clarify the meaning of the Act: given the separation of powers, one could not assume that Congress had confirmed an agency with legislative power (rate fixing) if it were not clearly

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[79] *Alabama Midland Railway*, 168 U.S. 144 (1897).

[80] Ibid at 163.

[81] Ely, *The Supreme Court under Melvin Fuller*, 91.

bestowed. When Congress amended the Act in 1903 with the Elkins Act, it still did not confer the ICC with rate-making power. The Elkins Act did prohibit secret rebates and required the railroads to file their rates with the ICC, which the Court later enforced. And when Congress finally did bestow clear rate making authority on the ICC in the Hepburn Act of 1906, under the appeal of Teddy Roosevelt, the Court upheld the power.[82]

The Hepburn Act bestowed upon the Commission rate making power for the first time, allowing it to declare existing rates unreasonable and prescribe new rates. The Act was not a challenge to the Court's opinion in *Cincinnati, New Orleans*, so much as a qualification, as Congress had a chance to clarify the issue in the Elkins Act and did not. Moreover, the Court itself moved into line with Congress once it had made clear that it vested the ICC with this power. In *ICC v. Illinois Railroad Company* in 1910, the Court upheld the Commission's rate-making power and even went so far as to say that it would confine itself to questions of law, deferring to the agency's judgment on questions of fact. With Justice Brewer alone in dissent, the Court noted that it would not "under the guise of exerting judicial power, usurp merely administrative functions by setting aside a law administrative order upon our conception as to whether the administrative power has been wisely exercised." In some ways, this echoed Chief Justice Waite's insistence from *Munn*, that questions of policy were questions for the legislature and not to be second-guessed under the guise of judicial review. And, no doubt, the Court had been severely criticized throughout this era for doing just

[82] Semonche, *Charting the Future*, 209.

that—as Roosevelt and others criticized the Court's antidemocratic tendencies. Yet the Court did defer to the legislature, here, when it stepped in and made its policy clear. The Court did not retreat from substantive review altogether—either in regard to ICC rate making or state rate making. The Court insisted that the need to engage in substantive review of some rates, to make sure they were reasonable, could be necessary in future cases and, in fact, the Court did find against the ICC in later cases. Judicial intervention of this sort was not altogether unwelcome. In passing the Mann-Elkins Act the Congress even called for a continued judicial role in this regard. While giving the ICC power to suspend rate changes by the carriers and to condemn short-haul/long-haul distinctions, granting the Commission the power to intrude into the realm of intrastate rates in the name of interstate commerce, the Congress gave the ICC virtually full control over interstate rates. But even here this power was subject to judicial review of the set rate's "reasonableness." In response to such developments, the Court, much as it did in antitrust, started to fashion a more expansive view of federal power, even if it wasn't easily reconciled with past opinions, or always consistent with future ones. In the *Minnesota Rate Cases*, the Court suggested that congressional regulation of intrastate rates, and even preemption of state rates, might be acceptable with a showing that "adequate regulation of interstate rates cannot be maintained without imposing requirements with respect to intrastate rates which substantially affect the former[.]"[83] The Court took this even further the next year in the *Shreveport Rate Case*, holding that the ICC could reach wholly intrastate

[83] *Minnesota Rate Cases*, 230 U.S. 352, 433 (1912).

rates if it could show that such rates actually burdened interstate commerce. Of course, the Court still held wide sway in determining whether such burdens had been met.

A leading scholar of American political development has suggested that the Court, moving with public sentiment, was recognizing the basis of the administrative state. The Court's "actions suggested that it would now use judicial discretion more cautiously so as to move with, rather than against, the mounting political pressures for change, and that in doing so, it would readjust its position in the new state on its own terms."[84] The Fuller Court, though, had already recognized congressional power in its earlier decisions, but called on Congress to clarify that power. When Congress did so, the Court often fell into line. That's not to say that this was an easy unfolding of constitutional meaning. On the contrary, Court opinions and constitutional doctrine were often in tension with one another and congressional intent in regard to national regulation and the constitutional reach of its power was frequently left unclear, to be filled in by the executive branch, the administrative agency, or by the courts. It was precisely this state of constitutional unsettlement—a recognition of constitutional indeterminacy—that added weight to the vociferous criticism of the Court (as I've noted). As the Court was engaged in the task of drawing boundaries upon what was a "reasonable" regulation and what was not, critics often saw the Court's distinctions as arbitrarily overturning democratically enacted legislation. Even if the Court's opinions were rooted in strong jurisprudential tradition, and even if the Court was

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[84] Stephen Skowronek, *Building the New American State: The Expansion of National Administrative Capacity* (Ithaca: Cornell University Press, 1981) 261.

acting within the contours of this doctrine, critics, as Friedman argues, "nonetheless perceived vast and incomprehensible indeterminacy in the doctrine."[85] Charges of judicial will, lawmaking, and bias, resonated because critics of the Court saw these principles as being applied in unpredictable ways. Indeed, Progressive critics of the Constitution like Herbert Croly were questioning these very principles, offering an alternate view of the Constitution (and democracy) and calling upon judges to defer to the legislature when it operated within the bounds of "reasonable" disagreement. As with antitrust, this decades long struggle reveals profound discontinuities within constitutional doctrine, which remained in a state of constitutional drift. We see this, just as evidently, in struggles over the regulation of labor and "liberty of contract."

The Ebb and Flow of Due Process

The year 1908 was, in many ways, as an explosive a year for the Court as 1895, as it again handed down a troika of opinions that set off political debate. The Court invalidated Congress' prohibition of "yellow dog contracts,"[86] applied the Sherman Antitrust Act to labor,[87] and invalidated a congressional attempt to hold employers responsible for employee injury as beyond the reach of Congress' commerce power.[88] In reaction to this trio of opinions, particularly at the height

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[85] Friedman, "The Lesson of Lochner," 1405.

[86] *Adair v. United States*, 208 U.S. 161 (1908).

[87] *Loewe*.

[88] *Employers Liability Cases*. Also, in *Ex parte Young*, 209 U.S. 123 (1908), the Court enjoined a state officer from proceeding against a corporation on the grounds that the law was unconstitutional. In the wake of *Young*, the states appealed to Congress and President Roosevelt, who took up the issue and Congress, in 1910, passed a statute forbidding the issue of such an injunction, unless it was heard in a court with three federal judges (one of whom must be at least a circuit court judge). The Elkins-Mann Act, see Warren, 717.

of Teddy Roosevelt's popularity, the Court was accused of manifesting a strong bias against labor. The fact that the Sherman Act was applied to labor in constraining trade was cynically viewed as evidence, if it were needed, of the Court's anti-labor animus. This was compounded by the fact that *Adair* struck down a section of the Erdman Act of 1898, which itself was passed by Congress "in response to the Pullman Strike of 1894 and was defended by its supporters as a measure to secure labor peace."[89] In many minds, this link between the Court's 1908 opinions and its 1895 opinions was a testament to the fact that no matter what Congress tried, the Court would have its say, siding with business against labor, and thereby engaging in a sort of lawlessness, entering the putatively neutral political arena on behalf of business against labor. And at the time, these opinions were given far more play than *Lochner*, the case that came to symbolize the era. The connection to *Lochner*, though, is important in *Adair*, not only in that it drew on "liberty of contract," but in that *Adair* was authored by that other great dissenter of *Lochner*—Justice Harlan. Critics of liberty of contract, both then and now, have thought that Harlan's majority opinion in *Adair* was inconsistent with his dissenting opinion in *Lochner*, authored just three years earlier. In *Lochner* Harlan had voted to uphold a New York maximum hours regulation for bakers as a legitimate exercise of the state's interest in protecting the health of the worker. In *Adair*, however, Harlan struck down Section 10 of the Erdman Act, where Congress prohibited railroad companies from blacklisting members of railroad unions or requiring employees to sign "yellow dog" contracts, which promised

[89] Fiss, *Troubled Beginnings*, 166.

that the employee would not join a labor union.[90] In doing so, Harlan relied on liberty of contract and cited, even, Peckham's opinion in *Lochner*. This apparent tension is easily reconciled. As revisionist scholars like Gillman and Barry Cushman have shown, Harlan, even though dissenting in *Lochner*, essentially shared the majorities' framework.[91] In *Lochner*, Harlan thought the maximum hours law was a legitimate health regulation, clearly aimed at preserving the health of the worker and not tampering with one's liberty of contract for arbitrary reasons. Congress' attempt to prohibit "yellow dog" contracts, on the other hand, served no legitimate public interest: it was a mere prohibition against both the employee and employer. Moreover, the standard for Congress was itself higher than for the states, as Congress, given the constitutional thought of the time, had only enumerated powers, not a general police power (like the states). Thus, Congress' prohibition of "yellow dog" contracts would have to be tied neatly to a regulation of interstate commerce—a claim that was difficult to make by the standards of the day.[92]

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[90] The government's defense of Section 10 illustrates the unsettled state of interstate commerce, as it drew upon the Court's recent commerce clause opinions: "The right of individuals or corporations to make contracts and do business is at all times subservient to the power of Congress to regulate interstate commerce, and common carriers are subject to greater control than private individuals by the State or Congress . . . on account of the public nature of such business" (at 64).

[91] Gillman, *Constitution Besieged*; Barry Cushman, *Rethinking the New Deal Court*, 109-138.

[92] Although, as a side note, the Court was responsive to Congress' broader reading of commerce on occasion. After it struck down an act regulating both interstate and intrastate employment relations as part of interstate commerce, in a second Employer's Liability decision, the Court upheld a congressional re-enactment that made the law applicable to employees in interstate commerce only, falling into line with Roosevelt's insistence, in a private letter to Justice Day, that if the reasoning of the first Employer's Liability case persisted, "we should not only have a revolution, but it would be absolutely necessary to have a revolution, because the condition of the worker would become inoperable." Urofsky and Finkleman, *The March of Liberty*, 579.

Even if we may see the constitutional doctrine underlying Harlan's opinions, revealing that they are not logically inconsistent, we can just as surely see that disagreements over what was a "reasonable" regulation and what was not—just as in antitrust and rate regulation—lead to charges of arbitrariness. This judicial pricking of lines—delineating what was a legitimate exercise of governmental power and what was not—left constitutional doctrine in a shifting state. The apparent disconnection between social demands and constitutional thought only added to Progressive criticism of a shifting Court. Presidents Roosevelt and Wilson began to articulate new constitutional standards, not only viewing the president's constitutional authority far more expansively, which included a general call for constitutional adaptation. As Roosevelt suggested: the Constitution "must be interpreted not as a straight jacket, not as laying the hand of death upon our development, but as an instrument designed for the life and healthy growth of the Nation." Wilson echoed this thinking, calling for Darwinian adaptation of principles to changing social conditions, a call which was taken up by the likes of Roscoe Pound, Dean of Harvard Law School, who began to recast the law in ways that rejected the old constitutionalism by taking into account social conditions. Writing immediately after the *Adair* decision in the *Yale Law Journal*, Pound asked: "Why do we find a great and learned court in 1908 taking the long step into the past of dealing with the relation between employer and employee in railway transportation, as if the parties were individuals—as if they were farmers haggling over the sale of a horse."[93] Such criticism resonated

[93] Pound, "Liberty of Contract," 454.

strongly with public sentiment, which refused to simply accept the Supreme Court's reading of the Constitution, urging new legislation and thinking that was at odds with (some) Court opinions. But the Court's prominent role also stemmed from the fact that Congress itself often called upon such judicial intervention (even if tacitly) and deferred to judicial determinations, making criticisms of "judicial lawmaking" with the overturning of congressional legislation far more difficult to sustain. We see both of these strains in the liberty of contract cases.

In *Adair*, Harlan struck down the prohibition of "yellow dog" contracts, finding that Section 10 of the Erdman Act was not a proper regulation of interstate commerce: the end Congress was trying to reach was not, in fact, aimed at interstate commerce, but at labor relations. Harlan had, as we have seen, a broad conception of the Commerce Power which was often at odds with his brethren's reading, but he saw Congress' prohibition of yellow dog contracts as an attempt to encourage union organization, which therefore favored one class over another.[94] Such a move violated due process:

> The right of a person to sell his labor upon such terms as he deems proper is, in essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee.[95]

Harlan then insisted that "any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify

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[94] Fiss, *Troubled Beginnings*.

in a free land."[96] Justice McKenna agreed with Harlan's general framework, but dissented, insisting that the Erdman Act was an acceptable regulation of interstate commerce—not a suspect species of class legislation—as it was essentially passed, in the wake of the Pullman Strike, to promote labor peace as part of preventing the disruption of interstate commerce due to labor strife. The difference between McKenna's dissent and Harlan's majority opinion—as they share the same constitutional framework, much like Harlan's dissenting opinion and Peckham's majority opinion in *Lochner*—points to two interrelated problems that resulted in continual constitutional struggle rather than settlement. First, the intent of laws regulating labor—as with other aspects of economic regulation—was not always clear. This resulted—in part—in continual disagreement on the Court, and off, in whether any particular enactment was within the accepted bounds of constitutional propriety. Even if the justices were working out of a coherent constitutional framework, each particular judicial determination of the constitutionality of legislation was open to charges of being arbitrary. Most importantly, for our purposes, this led to a continual enactment of legislation that probed the boundaries of constitutionality against unclear Court opinions. Even while Court opinions often offered broad-based constitutional principles, the Court itself was split on specific applications and, therefore, appeared to be fluctuating, giving the legislature little guidance. This case-by-case approach invited a sort of perpetual constitutional strife, requiring the Court to act on a

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[95] *Adair* at 174-175.

[96] Ibid. at 175.

case-by-case basis—applying particular sets of facts to each case—than as a Court of last resort settling broad based constitutional questions.[97]

Take *Muller v. Oregon*.[98] Decided the very same term as *Adair*, in this case the Court upheld an Oregon statute limiting women in factories, mechanical work, or laundries, to a ten hour work day. What's more, the Court's opinion was unanimous and written by Justice Brewer, a leading proponent of liberty of contract and, though often forgotten in our age, a leading proponent of women's equality (along with Justice Sutherland, another Court "reactionary"). *Muller* is famous, in part, for the celebrated Brandeis Brief, where the future justice compiled a mountain of sociological data to show that long working hours had deleterious effects upon women, the perpetuator of the species. Thus limiting women's hours was an acceptable—that is, reasonable—regulation of health. It is plausible that the Court—working from *Lochner's* framework—found a direct enough connection between the regulation of hours and women's health and thus upheld the law. A few years later, in *Coppage v. Kansas*, the Court struck down a state "yellow dog" contract regulation, relying squarely on *Adair* and *Lochner* suggesting that both were still viewed as sound constitutional doctrine. More puzzling is the Court's decision in *Bunting v. Oregon* in 1917, where it upheld a general ten-hour work day.[99] The reasoning seemed at odds with *Lochner*. Yet, even if it was a general law, applicable to all workers, distinguishing it from class

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[97] Robert Nagel argues that this, in fact, is how the Court operates, revealing that it is not truly capable of judicial supremacy. *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (Berkeley: University of California Press, 1989).

[98] *Muller v. Oregon*, 208 U.S. 412 (1908).

[99] *Bunting v. Oregon*, 243 U.S. 426 (1917).

based legislation, the Court itself later split on this logic. In the 1923 case of *Adkins v. Children's Hospital*, the dissenting justices drew on the logic of *Bunting*, arguing that it was not consistent with *Lochner*.[100] This was not just Holmes reiterating his dissenting opinion in *Lochner*, it was Chief Justice Taft, who shared the Court's general framework, insisting that "It is impossible for me to reconcile the *Bunting Case* and the *Lochner Case* and I have always supposed that the *Lochner Case* was thus overruled *sub silentio*."[101] As Taft argued, if there was a difference between *Bunting* and *Adkins*, it was that the latter regulated a minimum wage while the former regulated maximum hours. A regulation of wages—the very heart of liberty of contract, Sutherland reasoned in *Adkins*—was thus a far more obtrusive regulation and not justified as a matter of health, whereas hours regulation might plausibly be. But even if we accept this as sound constitutional reasoning, it reveals the fact that Court opinions themselves invite dispute as to their meaning, as they can usually be read to favor different outcomes. Sutherland insisted that a minimum wage for women was a violation of liberty of contract, because it was not a valid health regulation. He could either distinguish the case from *Lochner* or rest it upon it—his opinion was actually not clear on this, but either reading was plausible. Taft, on the other hand, saw the regulation of hours and wages as the same thing: "one is the multiplier and the other the multiplicand."[102] The fact that justices who shared the same

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[100] *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

[101] Ibid. at 564.

[102] Ibid. Gillman suggests a crucial distinction between maxim hours laws and minimum wage laws, as the later lacked any connection with a public purpose under the Lochner Era Court's constitutional reasoning. *The Constitution Besieged*,

constitutional framework—Taft and Sutherland, Harlan and McKenna, Peckham and Harlan—disagreed with its implementation in specific cases illustrates how Court opinions themselves do not settle constitutional questions, but invite dispute about past cases, constitutional power, and line drawing. These various judicial responses to persistent legislative probing of the contours of constitutional meaning were not easily of a piece.

This is not to reject revisionist accounts of the Lochner Era, which suggest that the justices were motivated by jurisprudential rather than crass political concerns. On the contrary, I find these accounts persuasive. This is not even to reject the role taken up by the judiciary in this regard. Rather, it is to suggest that the judiciary does not operate as the authoritative settler of constitutional meaning even when we invite judicial determinations and call on the Court to flesh out statutory and constitutional meaning. Congress often drafts legislation in an ambiguous manner, or leaves difficult questions for the Court to flesh out. As George Lovell persuasively argues in regarded to Section 10 of the Erdman Act, "even though the Act was ostensibly a legislative alternative to the system of judicial control of railroad strikes that had been expanded in connection with the Pullman Strike, the law was not, as Karen Orren suggests, an attempt by Congress to 'assault' judicial power or to place the courts 'under siege.' Rather, Congress included provisions that expanded the powers of the courts by giving judges important but vaguely defined oversight and enforcement responsibilities."[103] Viewing the Congress in relation to the Court, the Court is not simply striking

[103] Lovell, "As Harmless as an Infant," 223.

down a popular enactment of Congress. On the contrary, as Mark Graber suggests, the Congress often defers to the Court, letting the Court sort out difficult constitutional issues rather than taking them up itself, much as it did in the case of both the ICC and antitrust.

Focusing our eye more closely on congressional intent, we get a better understanding of the Court, revealing a dynamic where constitutional meaning moves back and forth between the branches. As Lovell illustrates, the Erdman Act was not as prolabor as it is made out to be and thus not as at odds with the Court's ruling in *Adair* as it is usually made out to be. In fact, the bill was drafted by Attorney General Richard Olney, who had vigorously argued for the government's power to put down the Pullman Strike, which the Erdman Act was in reaction to. At multiple points, Congress rejected provisions that would have been much more clearly "prolabor," especially in explicitly removing the labor injunction from courts, which was labor's most frequent demand.[104] But the Act did not do this. Neither, though, were supporters of the Act happy with the Court's reading. Even Olney wrote that "the inability of the Supreme Court to find any connection between the membership of a labor union and the carrying on of interstate commerce seems inexplicable."[105] This helps account for the fact that the constitutional issues in this area were often muddled, rather than clearly settled (either against Congress or in favor of it).

This persistent back and forth, an attempt to draw lines that seemed ever shifting, happened with state regulation as well, as we saw with the Court's

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[104] Ibid.

upholding of a maximum hours law for women in *Muller*, which was than expanded in *Bunting*, and seemingly reversed in *Adkins*.[106] The very year that *Adkins* was handed down, former Secretary of State and New York Senator Elihu Root, a trusted advisor to TR, but one who was often sympathetic to the Court, said in an address at the American Law Institute that, "the confusion, the uncertainty" that beset constitutional law "was growing from year to year" and making it mere "guess work."[107] Root noted this unsettled state of affairs while presenting the ALI's far flung project of giving the law a coherent structure, the particular report of which was aptly titled, "The Law's Uncertainty and Complexity." If the mid to late 1920s brought a respite from such conflict and uncertainty, it was short lived.

Conclusion

In *Constitutional Government in the United States*, Woodrow Wilson wrote that "each generation of statesmen looks to the Supreme Court to supply the interpretation which will serve the needs of the day." Yet Wilson did not call for free wheeling adaptation, as he went on to say, "the safety and the purity of our system depend on the wisdom and the good conscience of the Supreme Court. Expanded and adapted by interpretation the powers granted in the Constitution must be; but the manner and the motive of their expansion involve the integrity, and therefore the permanence, or our entire system of government."[108] In the

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[105] Warren, *The Supreme Court in United States History*, 715.

[106] Which is the equivalent of a state case, as it was a Congressional regulation within the District of Columbia.

[107] Wiecek, *The Lost World of Classical Legal Thought.*

[108] Wilson, *Constitutional Government in the United States*, 158.

midst of this call for evolutionary adaptation, with Darwin as interlocutor, Wilson even went on to embrace a narrow reading of the Congress' Commerce Power that was at odds with the Keating-Owen child labor act passed under his administration. Noting that "the real difficulty has been to draw the line where the process of expansion and adaptation ceases to be legitimate and becomes a mere act of will on the part of the government, served by the courts."[109] Turning to the specifics of Congress' power to regulate interstate commerce to illustrate his point, Wilson asked, "May [Congress] also regulate the conditions under which the merchandise is produced which is presently to become the subject-matter of interstate commerce? May it regulate the conditions of labor in the field and factory? Clearly not, I should say; and I should think that any thoughtful lawyer who felt himself at liberty to be frank would agree with me."[110] Yet Wilson not only signed into law the child labor act which, albeit ambivalently, did just this, he forced it through the Senate. Wilson's ambivalence on this question symbolizes the uncertainty of the age: an age fraught with constitutional discontinuities, partial dialogues and a state that is best characterized as constitutional drift.

Whereas the Congress of the Reconstruction era had a reasonably clear constitutional vision (that it ultimately retreated from), the Congress of the Progressive era was mired in constitutional and political uncertainty. Its "patchwork" attempts at regulation often invited the Court to flesh out the larger constitutional questions; on occasion, it was almost an invitation to judicial

[109] Ibid., 170.

supremacy, as when one senator debating the Sherman Act argued: "I do not see how we are ever going to know whether this bill is constitutional or not until it has been referred to the Supreme Court."[111] But, just as surely, Court pronouncements that were at odds with the political imperatives of the day were not simply accepted. Rather, the unsettled and contested state of constitutional meaning during this era mirrored the political struggles of the day—as disputes about constitutional meaning are rooted in the concrete politics of the times—which has even been described as a "search for order."[112] If the "Constitutional Revolution of 1937" finally brought order and settlement to the government's power to regulate the economy, at least until President Ronald Reagan's attempt to unsettle the New Deal, it opened up other areas in which the political struggle over constitutional meaning persisted. The New Deal settlement and Reagan's attempted unsettlement are, in turn, the subjects of the next two chapters.

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[110] Ibid., 171.

[111] Morgan, *Congress and the Constitution*, 154.

[112] Robert Wiebe, *The Search for Order* (New York: Hill and Wang, 1977).

CHAPTER 4

DISCONTINUITIES IN THE "CONSTITUTIONAL REVOLUTION OF 1937"

After the Supreme Court struck down the National Industrial Recovery Act in *Schechter Poultry Corporation v. the United States*, Franklin Delano Roosevelt delivered an extraordinary radio address in which he called *Schechter* the most important decision "of my lifetime . . .more important than any decision probably since the Dred Scott case." The Court would soon hand FDR a series of defeats finding much of the legislation at the heart of the New Deal unconstitutional. Roosevelt, though, was a staunch opponent of amending the Constitution to clearly grant the national government power he thought it already had. The problem for FDR was not with the Constitution, but with the Court's interpretation of it. This was fundamentally a clash of constitutional visions.[1]

To amend the Constitution, for Roosevelt, would be to concede that the Court's interpretation was right. He pushed this in a "fireside chat": "And remember one more thing. Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of Justices who would be sitting on the Supreme Court bench. An amendment, like the rest of the Constitution, is what the Justices say it is rather than what its framers or you might hope it is."[2] Roosevelt was only partly being sly: he refused

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[1] Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building" *Studies in American Political Development*, 11 (Fall 1997).

[2] Bruce Ackerman, *We the People: Transformations* (Cambridge: Harvard University Press, 1998) 327.

to believe that the Constitution was really what the justices say it is, but he put his finger squarely on the problem. For FDR, what was needed was a fundamental shift in constitutional thinking, not a formal amendment to the Constitution that would then be subject to judicial interpretation. As Roosevelt's Attorney General Robert Jackson, later elevated to the Court, explained, "it may be possible by more words to clarify more words, but it is not possible by words to change a state of mind."[3] Thus Roosevelt refused to concede that the current Court should determine constitutional meaning, insisting instead that the Court should adapt itself to the Constitution properly understood.

The ensuing struggle between Roosevelt and the Court, the "Court-packing plan," and the Court's abrupt shift remain the subject of intense scholarly debate. I view this struggle over constitutional meaning through the lens of constitutional settlement. The "Constitutional Revolution of 1937" is seen, by and large, as an extraordinary constitutional moment, a rare instance of constitutional politics, even while there is serious disagreement over what drove constitutional change in this period.[4] Writing in the *New Republic* shortly after the Court's famous switch, the redoubtable Edward Corwin argued that "American constitutional law has first and last undergone a number of revolutions, but none so radical, so swift, so altogether dramatic as that witnessed by the term of Court just ended. I have in mind only the results so far recorded in the actual decisions; when the logical possibilities for the future of these holdings are considered, the

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[3] Ibid., 329.

[4] See especially on this, Ackerman, *We the People: Transformations*.

impression left is, of course, still more striking."[5] And, indeed, the "Constitutional Revolution of 1937" has come to be seen as an extraordinary constitutional moment, a rare instance of constitutional politics and transformation,[6] that reordered our constitutional commitments by solidifying expansive national power while simultaneously placing the Supreme Court in the role of protecting civil liberties.[7] Scholars have thus situated the New Deal in a way that frames twentieth century American constitutional development.[8] The Court's protection of "fundamental rights" in the latter half of the twentieth century—from the initial sketch offered in *Carolene Products* footnote 4 to the

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[5] *Corwin on the Constitution*, Volume Two, edited by Richard Loss (Ithaca: Cornell University Press, 1987) 369.

[6] Scholars, of course, continue to argue over what drove constitutional change in this period. So-called internalists like Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998) argue that the change was largely based on legal thought, while externalists like Bruce Ackerman, *We the People: Transformations* (Cambridge: Harvard University Press, 1998) and *We the People: Foundations* (Cambridge: Harvard University Press, 1991) argue that the change was forced by political forces external to the Court.

[7] Here, as I argue below, traditionalist accounts and revisionist account seamlessly merge. For traditional accounts see, for example, Alpheus Thomas Mason, *The Supreme Court from Taft to Burger* (Baton Rouge: Louisiana State University Press, 1979), *Harlan Fiske Stone: Pillar of the Law* (New York: Viking, 1956) and "The Core of Free Government, 1938-40: Mr. Justice Stone and 'Preferred Freedoms'" 65 *Yale Law Journal* 5 (1956), Robert McCloskey, *The American Supreme Court*, second edition (Chicago: University of Chicago Press, 1994), and William Leuchtenburg, *The Supreme Court Reborn* (New York: Oxford University Press, 1994). For leading revisionist accounts see Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building" *Studies in American Political Development*, 11 (Fall 1997), "Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence" *Political Research Quarterly*, Vol. 47, No.3 (September 1994) and *The Constitution Besieged: The Rise and Demise of Lochner Era Police Power's Jurisprudence* (Durham: Duke University Press, 1993), Ackerman, *We the People: Transformations* and *We the People: Foundations*, Stephen Griffin, *American Constitutionalism: From Theory to Politics* (Princeton: Princeton University Press, 1998). There is even, arguably, an emerging post-revisionist synthesis. See Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner" 76 *New York University Law Review* 1383 (2001) and "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five" 112 *Yale Law Journal* 153 (2002).

Court's recent invalidation of a Texas statute that prohibited homosexual sodomy—is seen to flow inexorably from the commitments of the New Deal regime.[9]

This chapter argues that scholarship which treats the New Deal revolution as a coherent "constitutional regime" is misleading. The politics of constitutional meaning during this period are not so far removed from the ordinary course of American constitutional development. Constitutional change during this period may have been more radical, swift, and dramatic than other periods of constitutional struggle and change, but the difference is one of degree, not of kind.[10] The Court's constitutional jurisprudence prior to the New Deal was in an unsteady state, as we saw in the last chapter, as it both adapted to emerging constitutional thought and adhered to an older constitutional vision. While these two strands were not always in outright contradiction prior to the New Deal, the constitutional visions that each strand rested upon were fundamentally irreconcilable.

FDR's constitutional vision drew heavily on progressive constitutional thought, insisting that the Constitution must adapt to the times: "They [the opponents of the New Deal] do not know or realize that the Constitution has

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[8] On this see, Ken Kersch, *Discontinuous Development in American Constitutional Law: Civil Liberties and Civil Rights in the Twentieth Century* (New York: Cambridge University Press, forthcoming).

[9] *United States v. Carolene Products*, 304 U.S. 144, 152 (1938) and *Lawrence v. Texas*____U.S. ____(2003).

[10] Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner," is one of the few scholars to draw a distinction between this two periods, particularly in the different criticisms leveled at the Court in each period.

changed with the times . . . We revere it and have an affection for it because of the principles which it reflects, but in its material applications it of necessity has changed in keeping with the changing times and conditions."[11] In offering an adaptable view of the Constitution that would allow the national government to regulate the economy in expansive ways, FDR was attempting to unsettle inherited constitutional meaning as articulated by the Court (at least at times). Given the economic crisis, the debate was much sharper than it had been in the past (and the programs put forward more far reaching), but it was very much a continuation of the constitutional debate that the country had been having for over three decades. And the Court itself was seriously divided on the debate, vacillating in its opinions and constitutional view as it struggled with the expansion of national power, revealing the already eroding foundations of constitutional meaning prior to 1937. The boldness of the Court in striking down several waves of New Deal legislation in such a short period of time brought this simmering constitutional debate to a head.

In the ensuing struggle over constitutional meaning, FDR and the Congress partly modified their initials aims, suggesting a constitutional dialogue of sorts between the Court and the political branches, as recent scholarship has shown.[12] But there is a tendency to overplay this. The vision of an adaptable Constitution, rooted in progressive thought, was fundamentally at odds with the jural reasoning of a Justice Sutherland, who saw the Constitution's meaning as

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[11] Quoted in Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building," 231.

[12] Barry Cushman, *Rethinking the New Deal Court*.

fixed.[13] There was little room for dialogue. As Attorney General, and soon to be Supreme Court Justice, Robert Jackson put it in *The Struggle for Judicial Supremacy,* the New Dealers "knew that the constitutional doctrine on which they were relying had theretofore won adherence from only a minority of the Court. But they acted on it from conviction as well as necessity."[14] By 1941, this view triumphed: "the New Deal had resolved the basic questions of economic control."[15] Constitutional meaning in the areas of federal-state relations and the national government's reach under the Commerce Clause was settled when the Court came into line with Congress's and the President's constitutional views.

This has been aptly characterized in revisionist scholarship as a constitutional transformation[16] and the repudiation of "originalism" in the course of American state-building.[17] Yet, while this settled one area of constitutional meaning (at least for several decades), it opened up another area that remained—and indeed remains—in a state of constitutional flux. Rather than firmly situating the Court at the center of a New Deal Constitution where it would protect civil liberties, this constitutional transformation invited perpetual debate about the very

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[13] As Sutherland noted in a vigorous dissent against the Chief Justice's opinion : "A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time." *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 448-449 (1934).

[14] Robert Jackson, *The Struggle for Judicial Supremacy: A Study in a Crisis in American Power Politics* (New York: Knopf, 1941) 78.

[15] Robert McCloskey, *The American Supreme Court*, second edition (Chicago: University of Chicago Press, 1994) 119.

[16] Ackerman, *We the People: Transformations.*

[17] Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building."

meaning and legitimacy of the constitutional order (and the Court's role therein).[18]

When the New Deal justices abandoned guardian review of the Constitution by the Court, the central question became the proper scope of judicial power in relation to constitutional rights.[19] This debate has dominated constitutional law and jurisprudence for the last 60 years and remains as the fundamentally contested jurisprudential issue in legal scholarship and on the Court.[20] This chapter argues that this, too, is central to the Constitutional Revolution of 1937, making it is very difficult to treat the New Deal revolution as a coherent constitutional regime which solidifies the New American State while carving out an area of "preferred freedoms" protected by the Court.[21] That the Constitutional Revolution of 1937 removed the Court from deciding economic questions, or patrolling the boundaries between the states and the national government, while inviting the Court to take up the protection of civil liberties has become a virtual truism in American constitutional and political development. In this analysis, traditional and revisionist accounts of the New

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[18] See Kersch, *Discontinuous Development in American Constitutional Law: Civil Liberties and Civil Rights in the Twentieth Century*.

[19] G. Edward White, *The Constitution and the New Deal* (Cambridge: Harvard University Press, 2000).

[20] For the Court's most recent argument picking up this quarrel, see *Lawrence v. Texas*, ___U.S.___(2003).

[21] Both Gillman and Ackerman, along with numerous others, treat the New Deal as a new constitutional regime. See also Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker" *Journal of Public Law*, 288 and Keith Whittington, "The Political Foundations of Judicial Supremacy" in Sotirios Barber and Robert P. George, eds., *Constitutional Politics: Essays on Constitutional Making Maintenance, and Change* (Princeton: Princeton University Press 2001) and *To Say What the Law Is* (Princeton: Princeton University Press, forthcoming) situating the Court within a regimes understanding.

Deal merge: both agree that after 1937, the Court's job was to protect civil liberties. The expansion of state power and the immediate recognition of judicial deference led to a serious reevaluation of the judicial role: state-building and the search for judicial protection of rights are opposite sides of the same coin.[22] Yet, the reconstruction of civil liberties in the course of American state building is presumed more often than detailed.[23] But this recasting of the Court's role in articulating civil liberties is precisely where agreement about the Constitutional Revolution of 1937 ends.

It is not a coincidence that in the wake of this constitutional change justices and legal scholars were fundamentally preoccupied with grounding judicial power. Skepticism of judicial will was at the heart of the New Deal critique of the Old Court; it fundamentally shaped the post 1937 search for constitutional rights in a way that made it difficult to foster a firm foundation for such rights. This is evident in the three most prominent attempts to ground judicial discretion in constitutional interpretation, as initially put forward by Justices Stone, Frankfurter, and Black. These attempts are united in that they all begin with the question of judicial discretion and attempt to define constitutional rights in a way that tethers judicial power, rather than providing constitutional principles that guide judicial interpretation. This move, at the very

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[22] Gillman, "Preferred Freedoms," 626.

[23] See Ken Kersch, "The Reconstruction of Constitutional Privacy Rights and the New American State" *Studies in American Political Development*, 16 (Spring 2003), 61-87, 85. Kersch notes that Gillman's "Preferred Freedoms" is a prominent exception that "considers in a development-conscious way the relationship between contemporary civil liberties and the new American state." But even Gillman, as Kersch suggests, and as I argue below, essentially repeats the "progressive" model of constitutional development, 86.

core of the New Deal constitutional revolution, remains the subject of constitutional struggle, casting doubt on the reconstructive enterprise of situating the Court as the guardian of civil liberties (as now distinguished from economic rights).

Thus revisionist scholars of American constitutional development like Howard Gillman cannot so easily cast the Court's protection of "unenumerated" privacy rights as part of the New Deal Constitution, rejecting the putative "double standard"—if *Roe*, then *Lochner*—as inapposite under the (New Deal) Constitution.[24] Indeed, this chapter claims that the New Deal revolution placed the foundation of "civil liberties" in an essentially contested state. Moreover, the various jurisprudential strands that come out of the New Deal—as exemplified by Stone, Frankfurter, and Black—are unlikely candidates for furnishing the theoretical underpinnings of the Court's later privacy decisions. Thus scholarly preoccupation with justifying the judicial protection of "unenumerated rights," or a more exacting level of protection for some rights rather than others, including charges of "judicial lawmaking" and cries of a "double standard"—remain resonant as well as potent precisely because of the dilemmas at the heart

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[24] Gillman, "Preferred Freedoms," 649-650, Ackerman, *We the People: Transformations*, 390, Griffin, *American Constitutionalism*, 162.

of New Deal constitutionalism.[25] So when Gillman argues that disputes over "the source of [fundamental] rights have been transparent surrogates for debates over the nature and scope of judicial power,"[26] this is a result of the discontinuities brought forth by the "Constitutional Revolution of 1937." In fact, this chapter argues that the return of "original intent," as exemplified by Judge Bork and Justice Scalia, with its critique of "judicial activism and lawmaking" aimed against the Court's articulation of these very privacy rights, has its roots firmly in the constitutionalism of 1937.[27] Original intent and its preoccupation with cabining judicial will is a viable strand of the New Deal's historical trajectory. Here the ghost of *Lochner*, and the critique of protecting unenumerated or substantive rights, continues to remain powerful precisely because of the thinking at the heart of New Deal constitutionalism. Tracing out this unsettled inheritance of the New Deal revolution illustrates how

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[25] See Barry Friedman, "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five." Friedman gives a persuasive history of this academic obsession, which, he argues, is rooted in the progressive critique of the Lochner Court. Friedman argues, though, that this obsession is inapplicable to the constitutional debates, including the public reaction to judicial decisions, which follows the New Deal era. It may well be that we should get over this dilemma, as Friedman argues, but is advice to "liberals" at times seems to suggest that they should stop worrying about justifying judicial review in such terms and focus on the results—do you like the outcome? Elsewhere, "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner," 1390, Friedman argues that judicial review should be justified more in terms of public acceptance of judicial outcomes than the "legal" reasoning such decisions are based upon. But even this move would seem to take us back to debates about *Roe* and *Lochner*: isn't *Roe*, perhaps, just as illegitimate under these terms as *Lochner* was? So if this is the true "lesson of Lochner" then this old debate remains just as potent (at least in this area).

[26] Gillman, "Preferred Freedoms," 624.

constitutional debate works in fits and starts, revealing constitutional discontinuities and conflicts in some areas even while other areas are settled, thus placing the New Deal constitutional revolution in the flow of 20th Century American constitutional development rather than at the center.

The Court as Catalyst: Provoking Constitutional Conflict

On May 27, 1935, on what became known as Black Monday, the Court unanimously invalidated the National Industrial Recovery Act and the Frazier-Lemke Act on mortgage moratoria. Attention focused immediately on the *Schechter* decision, striking down the NIRA in its entirety, as the Court's reading of the delegation of powers and the Commerce Power would have profound implications for future New Deal legislation.[28] Writing for the Court, Chief Justice Hughes first found that the congressional delegation of power to the President, allowing him to establish fair trade codes for a trade or industry, was an unconstitutional delegation of power. In a concurring opinion, Cardozo even went so far as to call it "delegation running riot."[29] The opinion was not an immediate threat to congressional delegation, which was key to many New Deal agencies, as the Court focused on the lack of guidelines in this particular

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[27] Robert Bork, *The Tempting of American: The Political Seduction of the Law* (New York: Free Press, 1990), Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Liberty Fund, 1998), second edition, and Antonin Scalia, "Originalism: The Lesser Evil" 57 *University of Cincinnati Law Review* 849 (1989). Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999) offers a more principled argument for original intent, grounding it in the principles of popular sovereignty and the nature of a written constitution, rather than as a way to limit judicial will.

[28] The 'hot oil" cases struck down sections of NIRA, *Panama Refining Company v. Ryan* (1935).

[29] *Schechter Poultry Corp. v United States*, 295 U.S. 495, 553 (1935).

delegation of power, which, presumably, could be easily overcome in future legislation that was more carefully drafted. And the act itself was set to expire. In fact, many in the administration were quietly happy to see it go.[30] The opinion's true importance was found in its construction of the Commerce Clause—particularly given that the Court was not compelled to reach this constitutional question, as the act could have been held unconstitutional on delegation-of-power grounds alone.

Rather than stop there, though, Hughes found that the Schechter Poultry Corporation was a local operation engaged in production and therefore beyond the reach of national power under the Commerce Clause. The regulation of wages, hours and working conditions was part of the NIRA regulatory scheme, so the corporatism of the NRA went, in its attempt to bring order to industrial competition. To evade the regulatory scheme, as the Schechter brothers had, would affect interstate commerce as it would undercut the price of poultry in the national market and, thereby, undercut the income of farmers. Hughes, however, found that the Schechter Corporation was not engaged in interstate commerce. While, no doubt, the poultry had come from out of state and moved in interstate commerce, it "came to rest" in the borough of Manhattan, where it was "commingled" with the other property of the State of New York and was removed to Brooklyn where the chickens were slaughtered for local use.[31] "Neither the slaughtering nor the sales by defendants were transactions in

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[30] Homer Cummings, for example.

[31] *Schechter* at 543.

interstate commerce."[32] Hughes continued, "The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce, and was thus subject to congressional regulation."[33] If Congress was not regulating interstate commerce per se, or things that were part of the "current of commerce," the question was, how far does the commerce power reach to those things that affect interstate commerce but are not of it?

Here Hughes drew on a distinction between those things that "directly" affect interstate commerce and those things that only "indirectly" affect it, as most famously articulated in the 1895 Sugar Trust Case by Chief Justice Fuller, that I drew upon in the last chapter.[34] Under this rule, Congress, in regulating those things that affect interstate commerce but are not themselves part of interstate commerce, may only regulate those things which "directly" affect interstate commerce. Wages and hours, which are part of local production, have only an "indirect" effect on interstate commerce and therefore fall under the regulation of the states' police powers, not Congress' commerce power. "If the commerce clause were constructed to reach all enterprises and transactions which would be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government . . . Otherwise, as we have said, there

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[32] Ibid.

[33] Ibid. at 543.

would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government."[35] Hughes' construction of the commerce power drew heavily on inherited modes of legal thought that were being challenged by the New Deal lawyers. The distinctions between direct and indirect effects and between commerce and manufacturing found strong jurisprudential support in past cases like *E. C. Knight* and *Hammer v. Dagenhart* and, as recent scholarship has shown, was very much a part of the structure of constitutional thought in the early 20th century.[36] Yet, as an earlier generation of scholars like Corwin and Alpheus Mason argued, there were, in this same period, competing jurisprudential strands that had been articulated by none other than Hughes himself sitting as an associate justice (as argued in the previous chapter).[37] In the *Shreveport* Rate Case, for example, Hughes' opinions seemed to cut against the "direct/indirect" effects rule: Congress' "paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The

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[34] *United States v. E.C. Knight*, 156 U.S. 1 (1895).

[35] *Schechter* at 546. Though Hughes did cite his opinion in the *Minnesota Rate Cases* noting that local matters could be regulated if they had an impact on interstate commerce.

[36] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1994).

[37] Alpheus Thomas Mason, *The Supreme Court From Taft to Burger* (Baton Rouge: Louisiana State University Press, 1979) and Edward Corwin, "The Anti-Trust Act and the Constitution,"

successful working of our constitutional system has thus been made possible."[38] Moreover, Associate Justice Hughes seemed to suggest that the necessity of congressional regulation was a judgment that Congress must make: "In such cases, Congress must be judge of the necessity of federal action."[39] Hughes' opinion in *Schechter* points in a different direction: "It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it."[40] And, Hughes left implicit, this was a determination to be reached by the Court and *not* the Congress.

In making its case before the Court, the government lawyers were attempting to build on this second strand of thinking by situating the Schechter Poultry business within the "current" or "flow" of interstate commerce as outlined in *Swift*, *Shreveport*, and by Chief Justice Taft in *Stafford v. Wallace*. Corwin insists that "the Court's application here [in *Schechter*] of the distinction between 'direct' and 'indirect' effects upon interstate commerce represents an attempt to revive a precedent forty years old, and one which subsequent adjudication had almost completely discredited."[41] This overstates the case. The period was one of constitutional and jurisprudential flux, which is reflected in Supreme Court opinions that are often at odds with themselves. In the first

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[38] *Houston, East and West Texas Railway Co. v. United States*, 234 U.S. 342 (1914) and *Texas and Pacific Railway Company v. United States*, 234 U.S. 342 (1914), (known as the Shreveport Cases) which itself drew on *Swift*.

[39] *Shreveport* at 351.

[40] *Schechter* at 549.

[41] Corwin, "The Schechter Case—Landmark, or What?", 351

decades of the 20th century, the Court was not giving clearly reasoned opinions that lay out constitutional doctrine in such a way as to guide lawmaking. This would only grow worse in the years 1935-1941. As Chief Justice Taft had argued in *Stafford*, a case which augured well for the "current" of commerce theory, "This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effects upon it are clearly non-existent."[42] Was this the case in *Schechter*? Such questions had to be puzzled out from the various strands of the Court's opinions, pulling constitutional doctrine in different directions and allowing for a variety of plausible readings depending upon the particular facts of the case and which portions of a particular opinion one wanted to emphasize.

Cardozo's concurring opinion, joined by Stone, is suggestive in this light. While he did not embrace the conceptual distinction between "direct" and "indirect" effects, he did suggest a serious limit to Congress' power even under the notion of the "current of commerce." Cardozo reasoned that: "There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce."[43] Reasoning in such a fashion would go beyond the limits of the commerce power: "The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions."[44] From here he turned to the operation of the Schechter Poultry Co.: "To find immediacy or directness

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[42] *Stafford v. Wallace*, 258 U.S. 495, 521 (1922).

[43] *Schechter* at 554.

here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system."[45] Hughes pushed this argument further than Cardozo in rejecting the notion that extraordinary conditions might allow for extraordinary measures: "such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment."[46] In this way, the Tenth Amendment became a prohibition on national power, as was mostly fully articulated in *Hammer*.[47] Such a reading was not easily reconciled with Hughes' earlier readings of the commerce power, which seemed to preclude just such a limit. The ensuing constitutional struggle was precisely about the limits of constiutitonal power: the New Dealers were not claiming extra-constitutional power; rather, they were claiming that the Constitution must be read in a flexible manner, which had potentially grave implications for the traditional distinction between the "police powers" of the states and the commerce power of the national government. In *Schechter,* the Court, including credentialed "liberals" like Brandeis, Cardozo, and Stone, was unwilling to abandon altogether the distinction between federal and state authority in the regulation of interstate commerce. Even while many New Deal lawyers were deeply skeptical of *Schechter*—and some seemed happy to see the NIRA put to death—FDR would not be governed by the Court's opinion. Indeed, after a few days of

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[44] Ibid.

[45] Ibid.

[46] Ibid. at 529.

[47] *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

silence, he delivered an impassioned address to the nation, the peroration of which insisted that in the wake of the Court's opinion "we have been relegated to the horse-and-buggy definition of interstate commerce."[48] The dispute that had been percolating for over three decades was coming to a head.

In the wake of the *Schechter* opinion, Ackerman suggests that Roosevelt was forced to sharpen his constitutional vision and "put the country on notice that the New Deal was seeking to dismantle the very framework of traditional constitutionalism."[49] This is partly reflected in the acts passed after *Schechter*, what became known as the second New Deal. As Barry Cushman argues, this round of legislation was far more carefully drafted and litigated than the earlier acts, whose neglect of legal craftsmanship helped result in their being found unconstitutional.[50] Still, the ensuing debate reflected profoundly different views of the Constitution, partly reflected in the doctrinal tension between Court opinions, making it doubtful that the outcome would turn on more carefully crafted legislation. Thus, while the Wagner Act easily passed Congress in the summer of 1935 (partly because many thought it was unconstitutional), the Guffey Coal Act was much more contested in light of *Schechter*. The Guffey Act fixed the price of coal and regulated wages and production in the coal mining industry (although Congress provided that the provisions of the act were

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[48] Ackerman, *We the People.*

[49] Ackerman, *We the People*, 306.

[50] Ken Kersch, notes that the Wagner Act was in fact drafted largely behind closed doors by lawyers and thus finds it difficult to believe that the Act played quite the democratic ratification of the New Constitutional Revolution as Ackerman makes out. *Discontinuous Development in American Constitutional Law.*

separable: should the regulation of wages be found unconstitutional, the price fixing provision need not be). The scheme itself was remarkably like the NIRA in that it regulated an industry by allowing the trade associations themselves to promulgate codes that would be met by those within the association, while those who chose to remain outside of it would be subject to taxation. Given the dilemma of delegating governmental power to private associations under this regimen of corporatism, as put forward unanimously by the Court in *Schechter*, many within Congress and the administration doubted the Guffey Act's constitutionality.[51] Others were more sanguine. *Schechter* dealt with a quintessentially local industry, while the coal industry was of unquestioned national scope, the subject of intense labor disputes, and in clear need of regulation, all of which could justify Congress' reach in this particular case, even while leaving *Schechter* wholly intact. Oddly, though, when Roosevelt's Attorney General Homer Cummings was called before Congress to testify on the act, he demurred as to its constitutionality: "advising the subcommittee 'to push it through and leave the question to the courts.'"[52] Roosevelt himself sent a letter to the committee urging it to resolve any doubts about the bill's constitutionality in its favor, "leaving to the courts, in an orderly fashion, the ultimate question of constitutionality."[53]

The Court found the act unconstitutional—albeit in a much more divided fashion than the *Schechter* case, revealing the constitutional gulf on the Court as

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[51] Cushman, *Rethinking the New Deal Court*, 159.

[52] Ibid. 159.

it touched on national power. Writing for the Court, Justice Sutherland echoed Hughes' reading of the Commerce Clause as put forward in *Schechter*, finding that the regulation of wages and production was a local activity beyond the reach of Congress' commerce power: "The effect of the labor provisions of the [act] primarily falls upon production and not upon commerce. [P]roduction is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce."[54] Sutherland then spun out, far more thoroughly than Hughes had in *Schechter*, the distinction between "direct" and "indirect" affects as it bore on Congress's power to regulate interstate commerce. "The word 'direct'," Sutherland reasoned,

> implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about.[55]

The distinction Sutherland was offering up was a formal distinction, which was indifferent to actual economic consequences. But for Sutherland, a constitutional principle could not change in relation to a different set of economic facts. The

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[53] Ibid. 160.

[54] *Carter v. Carter Coal Co. v United States*, 298 U.S. 238 (1936). In fact, Sutherland offered a long exposition on the very nature of the Union and the Constitution to situate his reading of the Commerce Power.

[55] Ibid. at 307-308.

economic crisis the country was facing, a point noted again and again in the New Deal's sweeping legislation, did not, in any way, change the principles underlying the government's power. Sutherland had noted just this in a vigorous dissent against the Chief Justice's opinion in *Blaisdell* two years before: "A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time."[56] This was just as true for the regulation of commerce. The fact that Congress was attempting to regulate a small industry of little national consequence in *Schechter* and was now, in *Carter*, attempting to regulate a large-scale national industry did not alter the fact that in each case Congress was attempting to reach an area traditionally anchored within the local sphere, to wit—production. Such regulation was properly the province of the states and not the national government. "[T]he conclusive answer is that the evils are all local evils over which the federal government has no legislative control . . . Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character."[57] This dashed the slim hopes of some New Dealers that the reach of *Schechter* would prove limited. Sutherland's opinion, moreover, distinguished *Carter* and *Schechter* from the "current of commerce" doctrine as put forward in *Swift*. "In the Schechter case the flow had ceased. Here [Carter] it had not yet begun. The difference is not one of substance.

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[56] *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 448-449 (1934).

[57] *Carter v. Carter Coal* at 309.

The applicable principle is the same."[58] Sutherland's opinion did not contradict the "current of commerce" doctrine, but, as Corwin argues, it is in tension with it. As Taft had put it earlier, "The application of the commerce clause of the Constitution in the Swift Case was the result of the natural development of interstate commerce under modern conditions.. . . it refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such. The Swift Case merely fitted the commerce clause to the real and practical essence of modern business growth."[59] The current of commerce cases suggested a flexibility that would not be bound by Sutherland's more formal distinction between "direct" and "indirect" effects. While many of the current of commerce opinions are littered with references to "direct" and "indirect" regulations of commerce, their collective thrust points toward Congress' ability to regulate those things that have an impact on national commerce, thus putting them at odds with the logic of *Schechter* and *Carter Coal* (as well as *Hammer* and *E. C. Knight*).

Cardozo seized upon this in a dissenting opinion. Cardozo did not explicitly reach the question of Congress' regulation of production, as he found that the price-fixing provisions were well within the reach of Congress' power, and he did not, given the question before the Court, need to reach the question of the constitutionality of wages and hours regulations in this case. Still, his opinion reads as a virtual dissent on this issue as it takes explicit aim at

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[58] Ibid. at 306.

[59] *Stafford v. Wallace* at 518-519 (which Justice Sutherland joined).

Sutherland's analysis and lays out a rudimentary reading of the Commerce Clause that became central to the New Dealers' constitutional vision, as well the Court's initial articulation of constitutional change.

> Mining and agriculture and manufacture are not interstate commerce considered by themselves, yet their relation to that commerce may be such that for the protection of the one there is need to regulate the other. Sometimes it is said that the relation must be 'direct' to bring that power into play. In many circumstances such a description will be sufficiently precise to meet the needs of the occasion. But a great principle of constitutional law is not susceptible of comprehensive statement in an adjective. The underlying thought is merely this, that the 'law is not indifferent to considerations of degree.[60]

Cardozo, drawing on a theme that was at the heart of FDR's constitutional vision, insisted that circumstances must matter and that circumstances may then, pace Sutherland, influence our reading of the Constitution. He insisted that this was based on past readings of the Constitution as he, too, drew on the Court's "current of commerce" cases:

> A survey of the cases shows that the words have been interpreted with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that invokes it. . . What the cases really mean is that the causal relation in such circumstances is so close and intimate and obvious as to permit it to be called direct without subjecting the word to an unfair or excessive strain. There is a like immediacy here. Within rulings the most orthodox, the prices for intrastate sales of coal have so inescapable a relation to those for interstate sales that a system of regulation of the one class is

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[60] *Carter v. Carter Coal* at 327.

> necessary to give adequate protection to the system of regulation adopted for the other.[61]

Cardozo's opinion is redolent of the uneasy state of constiutitonal law in this period. As much as Sutherland, he is drawing on past Court opinions, even while offering an alternate reading of the Constitution. This same conflict was evident in *United States v. Butler,* handed down months before *Carter*, which struck down the Agricultural Adjustment Act in its entirety.

The AAA was part of the early New Deal's novel attempt to bring order to the national economy. In this scheme, processors of agricultural products were subject to a national tax unless they agreed to purchase the products at government set rates, which were higher, in an effort to maintain the farming communities' purchasing parity with manufacturing products. The question before the Court was whether such a scheme of taxation was consistent with congressional power to "lay and collect taxes for the general welfare." First, was this seemingly open-ended clause limited to the subsequently enumerated power of Congress, which said not a word about agriculture? Second, even if Congress' spending power was broader than its clearly enumerated powers, was this scheme for the general welfare, or was it, rather, a tax aimed at the benefit of a particular class (which might be a troublesome species of class-based legislation)? Justice Owen Roberts' opinion for the Court, much ridiculed over the years, held that Congress' power to tax and spend was not limited to matters within the scope of its clearly enumerated powers; yet he still managed to find

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[61] Ibid. at 328.

that the processing tax was beyond the reach of Congress' power. In not limiting Congress' ability to tax and spend for the general welfare to those specifically enumerated powers, the Court was putting forth a Hamiltonian over a Madisonian reading of the clause in this long-standing constiutitonal debate. But Roberts then declined to address the issue of spending for the general welfare: "But the adoption of the broader construction [Hamiltonian] leaves the power to spend subject to limitations."[62] Roberts then continued, "We are not now required to ascertain the scope of the phrase 'general welfare of the United States' or to determine whether an appropriation in aid of agriculture falls within it."[63] This was so for the Court, Roberts argued, because this particular scheme of taxation for the benefit of agriculture violated the Tenth Amendment. "The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government."[64] Reading the Tenth Amendment as a limitation on federal power, much as Hughes had in *Schechter*, Roberts drew on *Hammer v. Dagenhart*, which, as we have seen, limited the congressional reach of power to prohibit child labor because the Tenth Amendment reserved the regulation of production to the states. This reading of the Tenth Amendment is crucial, not simply because it was already the subject of contentious debate, but because, so read, it was a substantive limit on federal power. While this was not

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[62] *United States v. Butler*, 297 U.S. 1, 66 (1936).

[63] *Butler* at 68.

made explicit in *Butler*, it was in *Hammer*: even where Congress had the authority to act—regulating interstate commerce, for example—it could not reach those things that were reserved to the states; thus the amendment was in fact a substantive limitation even on *explicitly* enumerated powers.

Stone's famous dissent is remembered most vividly for its discussion of judicial power, which is perhaps appropriate, in that Stone's dissent identified what would become the central preoccupation in criticism of the New Deal Court: the proper scope of judicial power. As I will take up in part two of this chapter, this question came to dominate constitutional discourse once the expansive reach of national power was settled. Rather than focusing on the Tenth Amendment, Stone insists that if Congress has the power to lay and collect taxes for the general welfare, as the majority opinion seemingly concedes, then that power must also include the power to impose conditions therein. "It is a contradiction in terms to say that there is a power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure."[65] The Tenth Amendment argument would reappear, as would Stone's dissent in the coming confrontation between the political branches and the Court. In the meantime, it was the Court's decision striking down a New York state minimum wage law in *Morehead v. Tipaldo* that drew the most ire,

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[64] Ibid. Though Cardozo later drew on Butler's Hamiltonian reading of the general welfare clause in the Social Security cases, revealing how Court opinions may be puzzled out in future cases rather than simply settling the constitutional issue before them.

[65] *Butler* at 85.

creating, FDR said, a no-man's land were neither the states nor the national government could regulate the economy. Stone's dissent is particularly illuminating in touching on the Court's fluctuation as he reiterated his suspicion of judicial will: "Unless we are now to construe and apply the Fourteenth Amendment without regard to our decisions since the Adkins case, we could not rightly avoid its reconsideration even if it were not asked. We should follow our decision in the Nebbia case and leave the selection of the method of solution of the problems to which the statute is addressed where it seems to me the Constitution has left them, to the legislative branch of the government."[66] Stone insisted that *Nebbia v. New York*, which upheld a state regulation of the price of milk, redefined the public/private distinction in such a way that made it inconsistent with the Court's earlier minimum wage opinions. These earlier opinions—most notably *Adkins*—adhered to a distinction between public and private that the Court had rejected in *Nebbia*. Thus, following *Nebbia*, the Court should uphold the current minimum wage case and, thereby, explicitly reject its (now bygone) precedents. For Stone, *Tipaldo* and *Butler* both revealed the problems of judicial power. It was not just that the Court was making decisions that were properly vested with the legislature, but that the Court's own actions were not always consistent. Cushman persuasively suggests that *Nebbia*, authored by Justice Roberts, was inconsistent with *Tipaldo*, but that the Court was not considering the broad constitutional question—as Stone called for—but only the narrow question of whether the New York law could be distinguished

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[66] Quoted in Mason, *The Supreme Court From Taft to Burger*, 107.

from the Court's earlier precedent in *Adkins*. Roberts, thinking it could not, voted with the majority on this narrow question, even if it pulled against the thrust of his reasoning in *Nebbia*. This may rescue Roberts from charges of inconsistency, but for our purposes it illustrates the unsettled nature of constitutional law in this period. And the Court only adds to the confusion. While the Court was surprisingly not an explicit issue in the 1936 election, its opinions were actively debated as Congress continued to legislate on the issues[67] and the broader constitutional debate continued.[68]

Constitutional Revolution as Evolution

Congressional Interlude

Recent scholarship has suggested that the second wave of New Deal legislation, which would be upheld by the Supreme Court in a second round of cases, was informed by these early cases and thus attempted to avoid their shortcomings. As Peter Irons notes, "all of the Wagner Act draftsmen were lawyers. In this regard, the drafting process differed sharply from those which produced the NIRA and AAA, in which lawyers took a back seat to politicians, bureaucrats, and lobbyists."[69] This has led Cushman to suggest that many of the problems that beset early New Deal legislation were a result of poorly crafted legislation and a sloppy legal strategy in pursuing and arguing cases before the

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[67] Roosevelt doesn't mention the Court, but as Ackerman and Leuchtenburg suggest, opponents mention FDR's constitutional vision, making the Court's interpretation of the constitution critical to the election.

[68] Leucthenburg, "When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis," *Yale Law Journal* 108: 2077 (1999).

[69] Peter Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1982) 227.

Court.[70] In contrast, in drafting the Wagner Act (the centerpiece of the second New Deal), Leon Keyserling, a young Harvard Law graduate working on Senator Wagner's staff, carefully laid out a "Findings and Policy" explaining the purpose of the legislation and squarely rooting it in the "current of commerce" theory. This itself was in reaction to the *Schechter* decision, which was handed down while the legislation was being crafted. Even while many members of Congress were deeply skeptical of the Act's constitutionality given *Schechter,* the legal craftsmen drafting the bill attempted to distinguish it from the logic of *Schechter.* In defending the legislation, Senator Wagner himself drew on Hughes' earlier opinions permitting the regulation of unfair labor practices that created a burden on interstate commerce.[71] Wagner even quoted Chief Justice Taft: "If Congress deems certain recurring practices, although not really part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision or restraint."[72] In attempting to distinguish this second round of legislation from the first round, the lawyers drafting and then arguing the NLRA's constitutionality before the courts were certainly more careful than the NRA lawyers arguing the first round of legislation, of which many in the NRA itself were deeply skeptical. Still, no matter how the legislation was drafted, it is difficult to imagine the Court upholding the likes of the Wagner Act if it adhered to its reasoning in *Carter.* We should not overlook the fact that the administration was, in essence,

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[70] Barry Cushman, *Rethinking the New Deal Court.*

[71] Irons, *The New Deal Lawyers*, 232.

drawing on a line of constitutional thought that would give justices like Stone, Brandeis, Cardozo, and Hughes (and perhaps Roberts) a reason to uphold the legislation by rejecting the Court's immediate precedents. So even while the government was far more careful in making its case, the constitutional ground it was staking out was not easily reconciled with the Court's earlier New Deal opinions, however careful the government would be to draw such fine distinctions. The constitutional divide was widening, not narrowing.

Round Two

Unlike in *Schechter,* the NLRB had carefully selected test cases on which to defend the constitutionality of the Wagner Act, the central case being the *NLRB v. Jones and Laughlin Steel Corp.*[73] Jones and Laughlin was a large industrial enterprise with holdings in numerous states. As the NLRB lawyers framed the case, Jones and Laughlin was an integrated steel manufacture with raw materials and transportation holdings in various states. Materials were shipped into a Pennsylvania plant where they were processed and then (more than 75%) shipped out of the state as part of interstate commerce. Under the terms of the Wagner Act, the NLRB regulated production and working conditions as *part of* interstate commerce. The regulation of working conditions was central, the government contended, to preventing labor strife and strikes, which would disrupt the flow of interstate commerce in a direct way. This was

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[72] Ibid. 233.

[73] Though as Justice McReynolds noted in dissent, it is difficult to imagine these cases being upheld, no matter how carefully the law was crafted, given the Court's earlier reasoning: "A more remote and indirect interference with interstate commerce or a more definite invasion of the powers reserved to the states is difficult, if not impossible, to imagine."

all put forward as an appropriate exercise of Congress' commerce power. In arguing the case before the Supreme Court, the government's greatest problem was overcoming *Schechter* and *Carter*, the latter handed down while the various NLRB cases were moving through the courts. In both *Schechter* and *Carter*, the Court had insisted upon the distinction between commerce and manufacturing: Congress may regulate commerce and those things that directly affect it, but it may not reach production. Plausibly, *Jones and Laughlin* offered a factual distinction. While the movement of goods had come to a rest in *Schechter* and had not yet begun in *Carter*, the goods here were part of the "current of commerce" and thus were within Congress' reach. Thus "the government was not seeking a full retreat from the direct-indirect effects formula and the doctrine of dual federalism, but rather a shifting emphasis by the Court from those principles to the principles embodied in the stream of commerce cases."[74] Yet even if these two strands of Commerce Clause jurisprudence were not flatly contradictory, they were surely in tension with one another, as Hughes' opinion for the Court would illustrate.

Just before the Court handed down its opinion in *Jones*, the Constitutional Revolution of 1937 had already begun, when the Court handed down *West Coast Hotel Company v. Parrish*. The opinion by the Chief Justice explicitly overturned the line of cases upholding "liberty of contract." *Parrish* was handed down in the wake of FDR's Court packing plan and landslide reelection in 1936. Even if the case was in fact decided prior to the

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[74] Richard Cortner, *The Jones and Laughlin Case* (New York: Knopf, 1970).

announcement of the Court-packing plan, it looked like a dramatic reversal for the Court in the face of politics—all the more so, as the Court had just reaffirmed the doctrine of "liberty of contract" the year before in *Tipaldo*, resting its decision squarely on the *Adkins* case, which was now explicitly overruled. The switch has led to great arguments between so-called externalists and internalists: the former insisting that the Court reversed itself in the face of political pressure, the latter arguing that the constitutional change had its roots in legal thought and not mere politics. The distinction is too sharply drawn. For our purposes the point is the essentially contested and fluctuating nature of constitutional meaning at this time, between members of the bench as well as between the Court and the political branches.[75] While legal thought was in the midst of change, this change itself was based on the political imperatives of the day. It is unlikely that FDR's Court-packing plan was the immediate cause of the Court's shift and, in fact, the Court's shift very likely drained the plan of its public support.[76] Still, after the election of 1936, FDR was even more committed to his constitutional vision and determined to move the Court into line. As FDR himself later confessed, "I made one major mistake when I first presented the plan. I did not place enough emphasis on the real mischief—the kind of decisions which, as a studied and continued policy, had been coming

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[75] This is not to reject the fact that the Court is very much driven by legal thought and not mere politics. I find the revisionist accounts offered by Gillman, Cushman, and White, to name but a few, persuasive on this question. I'm emphasizing the fact that even if the Justices are driven by law, the Court does not act as the authoritative settler of constitutional meaning, particularly when its constitutional vision is under siege. As Gillman suggests, the Court abandoned a corroding legal formula that was proving unworkable.

down from the Supreme Court."[77] Yet, even if Court packing itself failed, Sheldon Goldman notes that policy considerations drove most of FDR's judicial appointees after 1937 in a deliberate attempt to remake the courts in line with his New Deal constitutional vision.[78] So while constitutional change and solidification did not occur at one moment in 1937, it was the Court, ultimately, that came into line with Roosevelt's constitutionalism. The beginnings of the Constitutional Revolution of 1937 point us toward a settlement of government regulation of the economy, the very nature of this settlement, as it nods to expansive governmental power, opens up new constitutional terrain with more questions than answers. We see the beginnings of this in Hughes' opinion in *Parrish*, especially as it is combined with his opinion in *Jones and Laughlin*.

In rejecting the line of cases in *Lochner*, *Adair*, *Coppage*, *Adkins*, and the recently decided *Tipaldpo*, Hughes insisted, "The Constitution does not speak of freedom of contract."[79] Liberty, Hughes said, drawing on Holmes' famous dissenting opinions in *Lochner* and *Adkins*, was necessarily subject to the "restraints of due process" and then posited that "regulation which is reasonable in relation to its subjects and is adopted in the interests of the

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[76] Gregory A. Caldeira, "Public Opinion and The U.S. Supreme Court: FDR'S Court-Packing Plan" *American Political Science Review* Vol. 81 No.4 December 1987, 1150.

[77] Quoted in Mason, Harlan Fiske Stone, 444. See also Michael Nelson, "The President and the Court: Reinterpreting the Court-packing Episode of 1937" *Political Science Quarterly* Vol. 103 No. 2 (1988).

[78] Sheldon Goldman, *Picking Federal Judges: Lower Court Selection From Roosevelt Through Reagan* (New Haven: Yale University Press, 1997) 35. Goldman suggests that presidents pick judges to further their agenda along three lines: their policy agenda, their partisan agenda, and their personal agenda. While all three of these figured into FDR's earlier judicial selections, after 1937 his policy agenda—that is, the advancement of substantive policy goals—dominated his judicial selections.

community is due process."[80] In this, Hughes cleared the way for governmental regulation of working conditions at the state level and very likely at the national level as well, as he signaled (following Stone's dissent in *Tipaldo*) that governmental intervention would not longer be subject to a rigorous private/public distinction. Thus one of the arguments against the NLRB's regulation of working conditions, that it was an intrusion on liberty of contract by subjecting private industry to regulation without a public purpose, was a constitutional nonstarter in the wake of *Parrish*. Whether Hughes' opinion was a complete break with liberty of contract and substantive due process is the subject of much scholarly debate.[81] But whatever the specifics, it began a debate about the proper scope of judicial power as it signaled a retreat from guardian review, a point that becomes more vivid when drawn together with Hughes' opinion in *Jones and Laughlin*. Writing for the Court two weeks after *Parrish*, Hughes' opinion began the second front of the constitutional revolution of 1937 by altering the Court's Commerce Clause jurisprudence. Again, as with liberty of contract in *Parrish*, it is open to question how far-reaching Hughes' *Jones and Laughlin* opinion was; it is best seen, like *Parrish*, as the beginning of revolutionary change and not the end. Hughes found that the activities of Jones and Laughlin clearly fell under the scope of the Wagner Act, insisting that "it is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of congressional

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[79] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

[80] Ibid.

power."[82] Even the casual reader of Hughes' opinion can clearly see the reliance on the "current of commerce theory." Drawing on the specifics of production, he continually places them as part of a larger process. Yet Hughes does not bind congressional regulation to the "current of commerce theory" alone.

> We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the 'stream of commerce' cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the Government invokes in support of the present Act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of the flow of interstate or foreign commerce.[83]

Hughes then continued, in what appears to be a specific rejection of *Schechter* and *Carter Coal*: "The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement.'"[84] And that power, Hughes insisted, "is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'"[85]

Cushman argues that given the particular facts of the case and the "current of commerce theory," Hughes could have simply distinguished *Jones and*

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[81] White, *The Constitution and the New Deal*.

[82] *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937). In its brief, the government drew heavily on *Stafford v. Wallace* and argued that *Schechter* and *Carter* were not applicable.

[83] Ibid at 36.

[84] Ibid at 36-37.

[85] Ibid.

Laughlin from *Schechter* and *Carter Coal* and left it there. And Hughes does in fact flirt with this option, leading Cushman and others to suggest that even in the wake of Hughes' opinion, many thought both *Schechter* and *Carter Coal* were still good law.[86] Rather than overturning these cases, Hughes simply found them not controlling. What is more, after stating this broad recasting of the commerce power and insisting upon its plenary nature, Hughes then began a move to limit such an expansive reading, noting: "the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[87] This insistence itself, while nodding to *Schechter* and *Carter Coal*, was a manifest departure insofar as it abandoned the formal distinction between direct and indirect affects and between manufacturing and commerce, which sat uneasily alongside the "current of commerce" theory. Here, Hughes' opinion drew on the logic of Cardozo's dissent in *Carter Coal*. "We are asked to shut our eyes to the plainest facts of our national life and deal with the question of direct and indirect effects in an intellectual vacuum."[88] No more, the Court said. But even this opinion would be short lived, as the Court began to spin out the scope of national power that was very much in line with Congress' and FDR's early assertions of national power;

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[86] Cushman, *Rethinking the New Deal Court*, 169.

[87] *Jones and Laughlin* at 37.

indeed, under the Court's cases after 1937 much that was once unconstitutional in 1935-37 was now constitutional.

Round Three

The emerging scope of national power became much clearer in Justice Stone's opinion in *United States v. Darby* and Justice Jackson's opinion in *Wickard v. Filburn*. Amidst the Court's opinions in 1937, Congress and the administration passed laws that were of questionable constitutional validity if the early New Deal cases were still good law—and they had not explicitly been repudiated in 1937. While in some cases Congress was careful to tailor the law so as to distinguish it from earlier laws that were struck down, in other instances, such as the Agricultural Adjustment Act of 1938[89] and the Bituminous Coal Act of 1937,[90] it virtually repassed the existing legislation. The difference after 1937 was that the Court was moving into line with congressional and executive views of national power, particularly as FDR was able to appoint justices who shared his constitutional vision. The real revolution took place after 1937, drawing heavily on one line of past constitutional cases, fissured though it was, but fashioning these cases in such a way as to dramatically increase the scope of national power and outline the contours of New Deal constitutionalism. Thus the Court situated revolutionary adaptation as no more than evolutionary change. The real revolution on the Court took place

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[88] Ibid at 41.

[89] The 1938 Act was based on Congress' commerce power, not its power to tax and spend, but it wasn't clear at the time how far reaching the commerce power was. The new AAA was upheld in *Mulford v. Smith* (1939).

as the Court reworked, *sotto voce*, prior decisions in such a way as to dramatically expand the scope of national power. Furthermore, this reworking of past cases was presented as an evolutionary adaptation rather than a revolutionary change.

In *Darby*, the Court upheld the Fair Labor Standards Act of 1938, which directly regulated working conditions in the form of hours and wages and prohibited the shipment of products in interstate commerce that violated the set standards. This was clearly a sweeping regulation of production, giving Congress the power to regulate production directly as part of its power to regulate commerce. Stone's opinion drew in part on Hughes' in *Jones and Laughlin*, arguing that Congress' power over commerce was plenary: "Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause."[91] In taking up the question of whether Congress may prohibit the shipment of goods manufactured under substandard labor conditions, Stone offered a more expansive view of the Commerce Clause that went beyond *Jones and Laughlin*, insisting that these "principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two

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[90] Which was upheld in *Sunshine Anthracite Coal Company v. Adkins* (1940)

[91] *United States v. Darby*, 312 U.S. 100, 115 (1941).

years ago in *Hammer v. Dagenhart*."[92] There, as we have seen, the Court insisted on the distinction between commerce and manufacturing, allowing congressional regulation of manufacturing only if it had a direct effect on interstate commerce. It was the logic the Court drew on in both *Schechter* and *Carter Coal*. What's more, in *Hammer* the Court had insisted that the Tenth Amendment could be read as a direct limitation on national power, so as to limit even Congress' enumerated power under the Commerce Clause if it touched upon things—namely production—that were left to the states. This logic was partly drawn on in Robert's opinion in *Butler*. Here Stone dismissed this logic, asserting that the Tenth Amendment was but a truism and not a substantive limitation on national power. Stone then squarely overruled *Hammer v. Dagenhart*. While he did not explicitly overrule *Schechter* and *Carter Coal*, it could scarcely be doubted that they now lacked all constitutional footing. There is simply no way to reconcile *Darby's* constitutional logic with these earlier cases. Stone even insisted that the logic of *Hammer*, which both these cases had partly drawn upon, "has long since been abandoned."[93] But its logic was only truly abandoned in this very case! In fact, *Darby* sits uneasily both with Cardozo's dissent in *Carter Coal*, which allowed for congressional regulation of those things that have a significant impact on interstate commerce, and with Hughes' *Jones and Laughlin* opinion which reiterated that logic (both breaking with the direct/indirect affects rule). Indeed, Stone's break from *Jones and*

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[92] Ibid.

[93] Ibid at 116.

Laughlin was clearest in asserting that there is no real judicial limitation upon Congress' Commerce Power. Whereas Hughes made a nod to the "dual nature of our system" and held out that it was still the responsibility of the Court to police that line, Stone insisted that "the motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."[94] *Darby* made clear that the Court would no longer exercise guardian review. A point, if it needed reaffirmation at all, that was made exquisitely clear in *Wickard*.[95]

Justice Jackson, Roosevelt's former Solicitor General and the author of the *Struggle for Judicial Supremacy*, confirmed the judicial retreat, explicitly acknowledging, against the backdrop of this struggle, the Court's acquiescence to national power. Under the Agricultural Adjustment Act of 1938, an act extraordinarily similar to the 1935 Act struck down in *Butler*, Congress gave the Secretary of Agriculture the power to institute quotas on crops.[96] The twist, here, was the Roscoe Filburn had exceeded this quota by sowing more wheat than he was allotted, but used it to feed livestock on his farm, not shipping the excess wheat in interstate commerce. Nothing had moved in interstate commerce. Yet Jackson insisted that this did not matter. Jackson's logic permitted Congress to regulate what was once a purely local matter. The line to

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[94] Ibid at 115.

[95] *Wickard v. Filburn*, 317 U.S. 111 (1942).

[96] The constitutional footing was altered, but still invaded the notion of powers reserved to the states by way of the Tenth Amendment.

be drawn here, Jackson insisted, was a line for Congress to draw and not the Court. This was far removed from even Cardozo's insistence in *Schechter* that "to find proximity here is to find it everywhere." It was to do just this, bringing an end to the middle New Deal years and those cases that permitted expansive national control, but still insisted upon outer limits, which the Court would patrol. *Wickard* abandoned the field. But this retreat raised a profound question about judicial review: when was it proper to exercise such a power? The question seemed all the more pressing as the constitutional arguments of 1934-1937 testified to an extraordinarily powerful national government. But were there limits and constitutional boundaries the Court should continue to maintain? While these questions were settled in the culmination of the New Deal cases in 1941 and 1942—when the Court moved into line with FDR's vision—so far as they touched upon governmental power to regulate the economy and the constitutional balance of power between the states and the national government, this was only part of the picture. Indeed, as I take up in the following section, the settlement of these questions provoked a growing constitutional debate about constitutional limits and judicial power as they touched on individual rights (now distinguished from economic rights) that would be contested for the next several decades. Not only were such constitutional questions not settled by the Constitutional Revolution of 1937, the quest to outline such rights and ground them in some manner was itself a product of this constitutional transformation.[97]

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[97] Gillman, "Preferred Freedoms."

The Court in Search of a Role

The Court's retreat from economic issues raised a central question about the Court's role. Stone's criticism of judicial power in his dissenting opinions amounted to a plea for judicial restraint. As Stone eloquently put it in his Butler dissent, "the only check upon [the Court's] exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the process of democratic government."[98] Stone took square aim at the majority of justices and accused them of sitting in judgment of the wisdom of government policy, not its constitutionality. The Court, Stone insisted, must reject any such role, deferring to the legislative branches, knowing that they may be misguided, but knowing, too, that the Court itself could be. Stone went further and rejected any notion that the Court was the peculiar guardian of constitutional limits:

> But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, to 'obliterate the constituent members' of 'an indestructible union of indestructible states[.]'[99]

Stone's plea for judicial restraint was rooted in his view of a flexible Constitution that must grant the government power to actually govern. In this Stone saw the Constitution as a living law that could not be cabined by rigid

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[98] *Butler* at 79.

[99] Ibid at 87-88.

formula, but must make accommodation to the "felt necessities of the times."[100] Judicial restraint was also a tacit acknowledgment to the legal realism and pragmatism of the day: Stone's plea was in part driven by a frank recognition that judges were inevitably influenced by their personal predilections, as he termed them elsewhere, which should make a judge all the more conscious and restrained in the exercise of judicial power.[101]

Revisionist scholarship on the constitutional thought of the New Deal years helps us situate Stone's critique of judicial power and the emergence of a new role for the Court in the course of American constitutional development. Gillman's scholarship has shown how American state-building in the early twentieth century, culminating in the New Deal years, led to a dramatic restructuring of our constitutionalism.[102] Throughout the nineteenth century and into the twentieth century, Gillman characterizes the Constitution as one of "limited power—residual freedoms."[103] National power was limited by way of enumeration, while rights were what remained after the legitimate use of power. Corwin famously described this understanding as an island of power in a sea of rights.[104] Traditionally, then, the burden was not on the rights bearer, but on the government: why was the state exercising its power? Limiting governmental power would turn on whether such a use of power was legitimate and not

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[100] Alpheus Thomas Mason, *The Supreme Court from Taft to Burger,* 140.

[101] Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* (New York: Viking, 1956).

[102] Gillman, *The Constitution Besieged.*

[103] Gillman, "Preferred Freedoms," 625.

[104] Stephen Macedo, *The New Right v. the Constitution* (Washington, D.C.: Cato, 1989).

individual rights per se. Rights were not, in the modern idiom, trumps.[105] Yet there was a presumption that one had the right, unless the government was engaged in legitimate regulation. Enumerated powers, by implication, implied unenumerated rights. Under this constitutional vision, the Court acted as the guardian of constitutional limits, which called upon it to continually scan governmental exercises of power (whether at the national or state level), probing them as legitimate or illegitimate. What would later by dubbed substantive due process for example, Edward White argues, was orthodox guardian review, "that of searching for the boundary between permissible legislative restrictions and impermissible legislative usurpations."[106] The dramatic expansion of governmental power culminating in the New Deal era challenged traditional constitutionalism by moving beyond a limited view of enumerated powers (and by implication, unenumerated rights). Indeed, Stone's plea for judicial restraint was a frank recognition of sweeping governmental power. Yet, if the government's power was expansive, would there be any judicially enforceable limits or was the judiciary to stay its hand in all cases?

It is in this context that Stone developed what Gillman calls the "general powers-preferred freedoms" model.[107] If the task of judges was once to limit the scope of governmental power by examining the purpose of legislation, with the removal of these limitations on legislative power, the task of judges would now be the development of individual rights that governmental power could not reach.

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[105] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1985).

[106] White, *The Constitution and the New Deal*, 266.

Thus while state power was once the preoccupation of courts, the courts would now be concerned with civil rights and liberties. Stone's development of preferred freedoms during this era is well known. Revisionist accounts like Gillman's sit easily with traditional accounts of civil liberties and rights after 1937-41. In the development of civil rights and liberties arguments, revisionist accounts amount to a traditional and progressive retelling of constitutional history, as if *Carolene Products* footnote 4 was the unquestioned foundation of New Deal constitutionalism, which easily incorporates substantive rights of "privacy" and "personhood."[108] Traditionalists insist that the Court, after 1937, was restoring John Marshall's jurisprudence from a thirty-plus year aberration of laissez-faire constitutionalism. Alpheus Thomas Mason captures this sentiment, "Dictated by political-economic dogma rather than by the Constitution, the commerce clause decisions marked a shrinking departure from Chief Justice Marshall's bold concept of the commerce power, a gratuitous betrayal of the grand design of the Constitution he extolled and enforced."[109] While revisionists might disagree with Mason's reading of the Marshall Court and the characterization of the Court as motivated by laissez-faire dogma—especially with the "demonization" of these justices—they would be immediately sympathetic to Mason's insistence that Stone "was beginning to claim for the Court a special responsibility for safeguarding the political processes. For unless it stepped in, interferences with this primary mechanism for obliging government to control itself might render

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[107] Gillman, "Preferred Freedoms."

[108] Kersch, "The Reconstruction of Constitutional Privacy Rights and the New American State."

free government a sham."[110] The corollary of expansive state power was the construction of preferred freedoms that were judicially protected. Thus both traditionalists and revisionists root the modern protection of civil rights and liberties with the Court's bifurcated standard of review in the Constitutional Revolution of 1937 first sketched in *Carolene Products* footnote 4. And while a Gillman or an Ackerman might not demonize a Justice Sutherland,[111] they readily go along with the canonization of a Brandeis as part of the legitimate constitutional change of 1937-41.[112] Revisionist accounts of the emerging judicial role as rooted in the constitutional change of this period are difficult to distinguish from traditionalist accounts. Thus Barry Friedman's insistence that "from the debate over FDR's [court packing] plan came a new vision of the role of the courts. Tremendous power having been ceded to the national government, the plan was the point at which the country balked. The accretion of government power threatened judicial independence, which at the time referred to the emergent role of the Court as the defender of individual liberty."[113] Friedman's account sits easily with a traditional account like William Leuchtenburg's, which sees the Court's extension of the Bill of Rights in the decades after 1941 as rooted

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[109] Mason, *The Supreme Court from Taft to Burger*, 99.

[110] Alpheus Thomas Mason, "The Core of Free Government, 1938-40: Mr. Justice Stone and 'Preferred Freedoms,'"604.

[111] Though Gillman does get in a few good shots at Sutherland

[112] White, *The Constitution and the New Deal.*

[113] Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Four: Law's Politics" 148 *University of Pennsylvania Law Review* 4 (2000), 1046. Though Friedman might properly be labeled "post-revisionist," in that he takes revisionist scholarship seriously and yet is not a "traditionalist," but has begun to merge the insights of both. See especially, in this regard, "The Lessons of Lochner."

in the Constitutional Revolution of 1937.[114] The settlement of the government's power to regulate the economy, this view suggests, entails the intimately related settlement of judicial power: henceforth, the Court shall act as the protector of civil liberties. My argument questions this constitutional settlement. Settlement of the first issue did not settle the second issue, but opened it up. It is not a coincidence, I argue below, that the most vexing constitutional question in the wake of the Constitutional Revolution of 1937 was how to legitimately ground judicial power—even in the protection of individual rights. This itself is typified by the scholarship of Herbert Wechsler, a one-time law clerk to Stone, and his search for "Neutral Principles" in constitutional adjudication. Wechsler captured the central dilemma that is rooted to the historical development of American constitutionalism in the wake of 1937: "The problem for all of us became: How can we defend a judicial veto in areas where we thought it helpful in American life—civil liberties area, personal freedom, First Amendment, and at the same time condemn it in the areas where we considered it unhelpful?"[115]

The ghost of *Lochner*, as it is often called, has long haunted legal scholars. Having digested the New Deal's telling of history, with the *Lochner* Court cast as illegitimately basing its jurisprudence on economic preferences rather than the Constitution, legal scholars were forced to wrestle with "how objective judicial

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[114] William Leuchtenburg, The Supreme Court Reborn, 237-258.

[115] Quoted in Leuchtenburg, *The Supreme Court Reborn*, 234. See also, Friedman, "The Birth of an Academic Obsession." Again, Friedman points to the historical contingency of this dilemma, but that itself hardly makes it less powerful if it was the preoccupation at the heart of New Deal constitutionalism, other than to suggest that we should forge a new understanding of judicial review, leaving the preoccupations of the New Dealer's behind us. But this opens the possibility, surely, for a return to older understandings of the Constitution as well.

decisions should be reached."[116] If substantive due process as embraced by the *Lochner* Court was bad, how does one justify the so-called privacy cases of *Griswold v. Connecticut* or *Roe v. Wade*? Scholars in American political and constitutional development have linked this development to the constitutional transformation of the New Deal years. The earlier generation of legal scholars treated the *Lochner* Court as an historical aberration and was therefore compelled to confront seeming inconsistencies between the progressive critique of *Lochner* and the modern Court's active use of judicial power in cases like *Roe*. Focusing on the historical development of the Constitution, scholars of American constitutional development resolve Wechsler's dilemma by explicitly recognizing the constitutional change of 1937, which is taken to legitimate the retreat from *Lochner* while simultaneously embracing *Griswold* and *Roe* as part of the Court's new role of protecting civil liberties in the New Deal constitutional regime. As Gillman puts it: "The eventual collapse of this constitutional tradition signaled the rise of a new American Republic organized around a different understanding of the proper use of legislative power."[117] Drawing on this constitutional change, Stephen Griffin explicitly rejects Wechsler's dilemma.

> Although the approach of the majority in *Lochner* was abandoned after the New Deal, this does not mean that the return of substantive due process in *Griswold* and *Roe* was the return of *Lochner*. The new substantive due process doctrine was used for different purposes and operated in fundamentally different political, legal, and social contexts. To ask how *Roe* can be justified if *Lochner* was unjustified

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[116] Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996) 5.

[117] Gillman, *The Constitution Besieged*, 15.

> thus makes the anachronistic assumption that the normative standards and relevant background did not change between 1905 and 1973.[118]

Ackerman too focuses on constitutional change to unravel the traditionalist's legal dilemma. For Ackerman, *Lochner* was rejected in the Constitutional Revolution of 1937 whereby the people ultimately ratified a new Constitution. This (New Deal) Constitution, according to Ackerman's synthesis, is broad enough to encompass *Griswold* and *Roe*. So simply put: *Roe* is grounded in the Constitution, *Lochner* is not. This gives *Roe* and the like solid constitutional footing in the "Constitutional Revolution of 1937." This is made evident in Ackerman's curious discussion of *Planned Parenthood v. Casey*, where the Court upheld *Roe*. In upholding *Roe*, Ackerman says, the Court staved off President Reagan's attempt at constitutional transformation and maintained our (New Deal) Constitution. Yet, Ackerman says very little about how the Constitutional Revolution of 1937 justifies *Roe*. Rather, Ackerman argues that *Griswold* (and thus presumably *Roe*) was a synthesis of the Founding's concern with personal liberty in a "post New Deal world of economic and social regulation."[119] To arrive seamlessly at this conclusion, Ackerman ignores the very reasoning put forward in Justice Douglas' *Griswold* opinion, which was preoccupied by the very

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[118] Stephen Griffin, *American Constitutionalism*, 168. Though if we recognize historical change as legitimately altering constitutional interpretation, there is no reason to preclude the return of "liberty of contract." Indeed, the changes wrought in the last years of the twentieth century may make the return of "dual federalism" viable. See, for example, Keith Whittington, Dismantling the Modern State? The Changing Structural Foundations of Federalism" 25 *Hastings Constitutional Law Quarterly* 483 (1998).

[119] Ackerman, *We the People: Foundations*, 141.

dilemma Ackerman seeks to dissolve.[120] These attempts to root the judicial defense of civil liberties, and particularly "privacy," in constitutional change amount "to a sophisticated refinement" of the "progressive model of constitutional development."[121] Moreover, rather than settling such questions about rights in a way that easily flows from *Carolene Products* footnote 4, as these scholars suggest, the New Deal revolution itself offered contrasting modes of constitutional thought that sought, in dramatically different ways, to ground judicial power. Here, we might even say that the equation of *Roe* with *Lochner* is not so easily resolved by pointing to constitutional revolution. After all, a powerful part of this constitutional revolution was just such a critique of judicial power, which could be leveled at the likes of *Roe*; indeed, as we will see, it is difficult to fit this privacy decision into any of the central lines of jurisprudential thought that emerged from the New Deal revolution.

Searching for Solid Ground

In the wake of the constitutional shift, retreating from economic issues, the New Deal justices quickly divided amongst themselves over the proper scope of judicial power. C. Herman Pritchett went so far as to call it a "quest for uncertainty."[122] While the New Deal justices agreed on judicial retreat from one

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[120] In Ackerman's account the New Deal Constitution protects just those rights he wants it to protect, plucking the privacy decisions from the past that he likes, and ignoring the others in such a fashion that doesn't take the New Deal change—in its rejection of "substantive due process"—very seriously. *We the People, Foundations*, 131-162 and *We the People: Transformations*, 390-403. For a far more persuasive account of privacy rights amidst the project of state building, see Kersch, "The Reconstruction of Constitutional Privacy Rights and the New American State."

[121] Kersch, "The Reconstruction of Constitutional Privacy Rights and the New American State," 86.

[122] C. Herman Pritchett, *The Roosevelt Court*, 46.

sphere, the reconstruction and regrounding of the legitimate scope of judicial power was a far more divisive question. I suggest that in the formative years after 1937-1941, there were essentially three clear alternatives to grounding judicial power, which would dominate constitutional thought for the next several decades. These three central attempts to recast judicial power might be described as "democracy-reinforcing," identified most closely with Justice Stone; "jural reasoning," identified with Justice Frankfurter; and "rights based textualism," identified with Justice Black.[123] I offer but a sketch of each solution, but want to draw out how each set about to resolve the problem of judicial will against the backdrop of constitutional change. Each attempt to ground judicial power must be understood against the historical development of our Constitution, even as each answer played an important part in subsequent constitutional development. The point is that these very different answers all had their feet in the Constitutional Revolution of 1937, while their fundamental disagreements with one another suggests the essentially contested and fluctuating nature of constitutional development over these years. The New Deal did not provide a foundation from which our post 1937 civil liberties naturally evolved; rather it called forth perpetual and discontinuous development.[124]

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[123] Frankfurter's jurisprudence as often been identified as "ordered-liberty." While I accept this characterization, I suggest that ordered-liberty is something to be identified by a discreet judicial mind—so it is the proper state of mind that is key to limiting judicial discretion.

[124] Kersch, *Discontinuous Development in American Constitutional Law*.

The most famous statement auguring a recasting of judicial power came in *United States v. Carolene Products*, although it was rather obliquely tucked away in the now famous footnote 4 by Stone. *Carolene Products* is usually taken to be an insignificant case, now heralded only because of footnote 4. Yet the case is interesting as it profoundly reveals the Court's retreat from economic issues. At stake was a congressional statute that prohibited the movement of filled milk (a milk product enriched with vegetable fat) in interstate commerce, as it was deemed by Congress to be an unhealthy product (compared to whole milk). Under traditional guardian review, which dominated the Court until the previous year, the Court may well have questioned the reasonableness of this enactment, probing to discover if this was in fact a valid health regulation or a species of regulation aimed to protect some groups over others (which, arguably, is exactly what the legislation was).[125] Under the new regime, though, the Court would not subject the legislation to such a critical eye. As Stone put it in the body of the opinion

> There is no need to consider [the law] here as more than a declaration of legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as to the reports of legislative committees, by revealing the rationale of the legislation. Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the

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[125] See Geoffrey P. Miller, "The True Story of Carolene Products" *The Supreme Court Review 1987* (Chicago: University of Chicago Press, 1988).

> assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[126]

Here Stone inserted footnote 4 to potentially qualify the Court's deferential attitude and its presumption of constitutionality when reviewing economic legislation. Stone offered three essential qualifications where there would be a "narrower scope for the operation of the presumption of constitutionality": (1) When legislation appears to violate a specific prohibition of the Constitution, especially the Bill of Rights. (2) When legislation "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." And (3) when legislation impinges upon a "discrete and insular minorities" that cannot be expected to appeal effectively to the democratic process. At root, Stone's logic developed a two-tier theory to guide and ground the use of judicial power. In ordinary circumstances, when the legislation before the Court touched on economic issues, the Court would defer to the legislature and apply the rationality test. The question for the Court was not whether this legislation was wise policy, the criticism Stone and others had leveled at Justice Sutherland and his colleagues, but whether the legislature could, conceivably, have a rational reason for pursuing such legislation. Once the legislation had passed this relaxed standard of review that was the end of the question for the Court. In a much smaller group of cases, the Court would subject the legislation to "a more exacting judicial scrutiny," what became known as strict scrutiny. Stone marked out these areas in footnote 4 where the Court would demand that the

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[126] *United States v. Carolene Products*, 304 U.S. 144, 152 (1938).

legislation meet a compelling governmental interest and be narrowly tailored to that interest. The Court would be generally deferential—an important claim in 1938 that should not simply be taken for granted—unless the legislation interfered with the democratic process or directly implicated the Bill of Rights (although, as I will note below, Stone seemed to have reservations about this area). The critical basis of *Carolene Products* was that it recast judicial power as supplementing the democratic process: the Court's role was not to second guess the legislature, but to police the system in such a way that kept the democratic process open. If, as Stone had insisted in numerous dissents, we think the legislation before us unwise, the proper recourse is to appeal to the democratic process, not to the Court. If, however, the democratic process was closed, or if a "discrete and insular minority" could not trust the protection of their rights to the democratic process (as they were always outnumbered), then the judiciary was compelled to act to ensure that the democratic process remained open and fair. Moreover, as John Hart Ely has argued, the Court's taking on the maintenance of process fit neatly with its retreat from weighing in on substantive values.[127] If the Court had rendered substantive judgments about the proper scope of legislation, and had addressed, as well, the substance of such legislation as part of guardian review, reinforcing the democratic process would not implicate the Court in such areas (now deemed fraught with value judgments). Instead, the Court was concerned with process alone, making it far less likely that the justices might substitute their

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[127] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

substantive judgments for the legislature's (as they were not concerned with the legislature's substantive judgments). Part of preserving the democratic process would also entail the preservation of rights intimately connected to the democratic process, what would become known in the years 1938-1941 as the preferred freedoms. These freedoms—free speech in particular—occupied a preferred position because, unlike other rights, especially liberty of contract, they were intimately connected to the "core of free government." In an ordering of constitutional values, they required special judicial solicitude. But they did so in a way that limited judicial power to reinforcing democracy; the emphasis on process rather than substance was key to limiting judicial will for Stone.

Frankfurter: The Jural Mind

Frankfurter rejected both Stone's footnote 4 and Black's textualism (especially as it applied to incorporation). Yet Frankfurter's own attempt to ground judicial discretion is elusive.[128] In the wake of the "Constitutional Revolution of 1937," Frankfurter pleaded for judicial restraint, so much so, that at times he seemed to call for a complete judicial retreat in the face of democratically enacted legislation. For Frankfurter, restraint is grounded in a peculiar judicial temperament that is necessary to protect those values that are central to our conception of "ordered liberty," even while giving due process of law the flexibility it needs.[129] Confronted with the problem of judicial discretion

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[128] See especially, H. N. Hirsch, *The Enigma of Felix Frankfurter* (New York: Basic Books, 1981).

[129] See Gary Jacobsohn, *Pragmatism, Statesmanship and the Supreme Court* (Ithaca: Cornell University Press, 1976) 114-160, on Frankfurter's statesmanship.

as forcefully articulated in Stone's *Butler* dissent, Frankfurter did not attempt to take refuge in grounding the Court's judgment in process over substance (as Stone does) or in textualism (as Black does). Rather, Frankfurter is ever aware that justices must exercise discretion as part of their judicial duty. The answer to limiting such discretion must be found in just this conscious recognition: a recognition cultivated by the proper judicial temperament.[130] On the one hand, this led Frankfurter to be exceedingly deferential to the democratic process, suggesting that so long as that process was open, the Court should stay its hand.

> But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties. Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.[131]

When the Court reversed Frankfurter's opinion a few years later, he went even further, insisting that a sense of judicial self-restraint was the only thing that could prevent a return to the judicial hubris of the past:

> Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court's authority for attributing different roles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is

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[130] Mark Silverstein, *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making* (Ithaca: Cornell University Press, 1984) 128.

[131] *Minnersville School District v. Gobitis*, 310 U.S. 586, 600 (1940).

> concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. In no instance is this Court the primary protector of the particular liberty that is invoked.[132]

Here Frankfurter rejects both Stone's and Black's insistence that certain rights are entitled to more judicial protection than other rights. The lesson of 1937, for Frankfurter, prohibited any application of a double standard and demanded judicial deference to legislatures no matter what liberties were at stake. Frankfurter pushed this line of thinking in two free speeches cases, taking further aim at footnote 4.

> Above all we must remember that this Court's power of judicial review is not 'an exercise of the powers of a super-legislature.' Some members of the Court—and at times a majority—have done more. They have suggested that our function in reviewing statutes restricting freedom of expression differs sharply from our normal duty in sitting in judgment on legislation. . . It has been suggested, with the casualness of a footnote, that such legislation is not presumptively valid and it has been weightily reiterated that freedom of speech has a 'preferred position' among constitutional safeguards.[133]

Whether legislation impinged upon rights that were fundamental to the democratic process or rights that were textually enumerated made no difference. Yet, just as Frankfurter himself was rejecting this notion, he seemed to pull back: "Those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum and respect lacking when appeal is made to liberties which derive

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[132] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 648 (1942).

from shifting economic arrangements."[134] Frankfurter went on to say that, even so, "these are matters for the legislative judgment controlled by public opinion."[135] The deeper point is that Frankfurter rejects the notion of "preferred freedoms" as a sort of mechanical jurisprudence, illustrating his insistence that a discerning and attuned jural mind, weighing context and history, is the only way to get at these rights.[136] Frankfurter turned to notions of "ordered liberty" to draw these rights out.

As H.N. Hirsch has noted, "Frankfurter thus believed simultaneously in both self-restraint and in fundamental values."[137] Yet, as Gary Jacobsohn notes, "we can perceive once again the tension between Frankfurter's adherence to fundamental principles and his policy of self-restraint."[138] This is so because Frankfurter's solution to the problem of judicial will was based primarily upon the proper judicial temperament. It was the justice's proper furnishing of mind that would overcome the dilemma of 1937. This required self-restraint in most instances, but also the flexible articulation of fundamental values, the very drawing out of which was part of Frankfurter's notion of the jural mind, when necessary. Thus, as Hirsch argues, Frankfurter would often claim to be "disinterested," that as a justice "he was capable of divorcing his personal opinions from a necessary action." This was simply part of the judicial

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[133] *Dennis v. United States*, 341 U.S. 494, 526-527 (1951).

[134] *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949).

[135] Ibid at 97.

[136] Silverstein, *Constitutional Faiths*, 143.

[137] Hirsch, *The Enigma of Felix Frankfurter*, 137.

temperament. Frankfurter drew this out in his opinions: "The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function."[139] But rather than grounding judicial will in textual interpretation, or the democratic process, Frankfurter mitigated the central problem by insisting that justices must be conscious of the problem:

> To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges . . . To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert to tolerance toward views not shared. But these are precisely . . . the qualities society has a right to expect from those entrusted with ultimate judicial power.[140]

For Frankfurter the flexible discovery of and articulation of fundamental values, balanced against the needs of society, was the very art of judging. He was not so far removed, in this, from a Justice Sutherland. The key distinction, for Frankfurter, would be that Sutherland was too inflexible and, thereby, wasn't detached enough. Sutherland was a mechanical jurisprude. This points us to the fact that Frankfurter, unlike Stone and Black, sought to overcome the lessons of 1937 not so much by recasting the role of the Court, but by recasting the jural mind. Jacobsohn hits at this just so: whereas the Old Court "referred to natural

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[138] Jacobsohn, *Pragmatism, Statesmanship, and the Supreme Court*, 140.

[139] *Rochin v. California*, 342 U.S. 165, 170 (1952).

[140] Ibid at 171.

right; [Frankfurter] spoke of 'notions of justice,' of 'civilized canon of decency,' and of the 'concept of ordered liberty.' But in point of fact, their perspective standards were not too dissimilar."[141] And so Frankfurter would overcome his restraint if, given standards of due process, the state's action "shocks the conscience."[142] At other times, however, Frankfurter would insist that the justices must defer: "relief must come through an aroused popular conscience that sears the conscience of the people's representatives."[143] Knowing when to do what was part of the proper furnishings of mind of a justice. For Frankfurter, it was this understanding that separated him from a Sutherland.

Black's Textualism

Carolene Products was handed down Black's first year on the Court and while Black joined the opinion, he wrote a brief concurrence for the sole purpose of rejecting Stone's footnote 4.[144] This move helps illuminate Black's subsequent attempt to ground the judicial protection of rights. While Black is often associated with the short-lived era of preferred freedoms as articulated by Stone, this doesn't quite capture his thinking and threatens to obscure his fundamental disagreement with Stone. For Black, the search for preferred freedoms that should be robustly protected by the Court was not so elusive: The Court was obligated to robustly protect those rights that had been marked off for protection when they were clearly enumerated in the Bill of Rights. These were preferred freedoms, not

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[141] Jacobsohn, *Pragmatism, Statesmanship, and the Supreme Court*, 141. See also Silverstein, *Constitutional Faiths*, 142-155.

[142] *Rochin* at 172.

[143] *Baker v. Carr*, 369 U.S. 186, 270 (1962).

because they were central to the democratic process, not because they were fundamental to a conception of ordered liberty, but because they were singled out for protection by a democratically ratified constitutional text.[145] As Black put it in a later concurring opinion, taking particular aim at Frankfurter's majority opinion in *Rochin v. California*, "I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority [of the Court]. What the majority hold is that the Due Process Clause empowers this Court to nullify any state law if its application 'shocks the conscience,' offends 'a sense of justice' or runs counter to the 'decencies of civilized conduct.'"[146] For Black this gloss on due process, much like the Court's special solicitude for the democratic process, was no different than earlier attempts to protect liberty of contract; it risked equating the values of the New Deal justices' with the Constitution.[147] "For we are told that 'we may not draw on our merely personal and private notions'" and "we are told that the discovery must be made by an 'evaluation based on disinterested inquiry pursued in the spirit of science and on a balanced order of facts.'"[148] Yet, when Frankfurter found that certain conduct offended notions of due process because it "shocked

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[144] Silverstein, *Constitutional Faiths*, 134.

[145] Silverstein notes that Black did join Justice Cardozo's famous opinion in *Palko v. Connecticut*, which exemplified Frankfurter's notion of "ordered liberty" that so horrified Black. Yet, as Silverstein argues, Black joined the opinion his first year on the Court largely out of respect for Cardozo and prior to working out his textualist jurisprudence that rejected such subjective notions in its quest to ground judicial will. *Constitutional Faiths*, 141.

[146] *Rochin* at 75.

[147] Silverstein, *Constitutional Faiths*, 136.

the conscience," Black insisted that such pleas were meaningless. Justice Sutherland, too, insisted that he was merely following constitutional command and not basing his decision on personal motives. Black no more believed Frankfurter than he believed Sutherland. Fully digesting Professor Frankfurter's critique of Sutherland, Black insisted that the only way to ground judicial discretion, to get around the personal preferences of the justices, was to root oneself in constitutional text.[149] This was key to Black's defense of the Bill of Rights and his insistence that the Fourteenth Amendment incorporated these rights, making them applicable to the states.[150] Thus liberty in the Fourteenth Amendment was neatly defined by the Bill of Rights itself, which grounded notions of due process by tethering judicial discretion to constitutional text and not the "vague contours of due process" that allowed justices to roam at large.

This move also led Black to get around questions of the "double standard": why should some rights be subject to a more exacting judicial scrutiny than others? To turn to the democratic process or fundamental notions of ordered liberty, as Stone and Frankfurter did, was to open oneself to the same criticism that these justices had leveled against "substantive due process." It was a criticism that Black himself would level against his fellow justices in *Griswold v. Connecticut*, the contraception case that evoked memories of "substantive due process" from the Court's earlier jurisprudence, when the Court held that

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[148] Ibid.

[149] Leslie Friedman Goldstein, *In Defense of Text* (Lanham: Rowman and Littlefield, 1990).

[150] *Adamson v. California*, 332 U.S. 46 (1947).

forbidding the use of contraceptives and the dissemination of information about contraception was unconstitutional (but on rather vague grounds of privacy):

> The due process argument . . . here is based on the premise that this Court is vested with the power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or this Court's belief that a particular state law under scrutiny has no 'rational or justifying' purpose, or is offensive to 'a sense of fairness and justice.' If these formulas based on 'natural justice,' or others which mean the same thing are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise of unnecessary.[151]

Black insisted that this was no different than what the Court had done prior to 1937 and it was just as illegitimate here, as it gave justices discretion to choose those values they preferred, leading them to determine whether such legislation was reasonable or not. And Black continually insisted that such a reading, making what constitutes a reasonable regulation a judicial judgment, might just as easily slight constitutional rights. As he put it in an earlier case: "So long as this Court exercises the power of judicial review . . .I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.' Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress."[152] Allowing justices to gloss notions of due process and fundamental fairness was of a piece with allowing justices to determine the reasonableness of state or congressional regulation of textual rights: both put us at the mercy of justices by leaving judicial will untethered.

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[151] *Griswold v. Connecticut*, 381 U.S. 479, 511 (1965).

[152] *Dennis* at 580.

The Ghost of Lochner

The attempt to ground judicial discretion continues to preoccupy constitutional interpretation. And while scholars of American constitutional development focus on the fundamental changes wrought by the New Deal, the usual insistence that *Lochner* was part of an earlier era that no longer applies, is more difficult to maintain.[153] The central jurisprudential lines that emerge from the New Deal—in Stone, Frankfurter and Black—must be understood against the backdrop of *Lochner*. This does not suggest a return to the jurisprudential vision of the *Lochner* Court. Gillman seems right that the course of American political development has rendered that constitutional vision inadequate. Rather, I want to suggest that *Lochner* remains potent in the search for grounding judicial discretion. It haunts the "painstaking and politically-charged task of articulating, for the first time in American constitutional history, precisely what kinds of freedoms deserved to be characterized as truly fundamental."[154] And it does this precisely because the New Deal critique of *Lochner* is bound up with the Constitutional Revolution of 1937 making it a part of the New Deal's constitutional trajectory. Revisionist scholarship has rescued the New Deal Court from its ignominious place in history, but it has not been as successful in wrestling with our constitutionalism post 1937. And this is because the New Deal did not only leave such questions unsettled, it made the very nature of judicial power the central question, thereby insuring that the search for constitutional

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[153] Gillman, "Preferred Freedoms."

[154] Gillman, "Preferred Freedoms," 648.

grounding would remain contested and unsettled. Let me draw on a rather lengthy quote from Professor Jacobsohn, who eloquently hits at the central problem:

> A situation may demand self-restraint or it may demand activism—the actual choice is to be determined by whatever appears necessary to affirm constitutional principle and purpose. With this understanding, the mental gymnastics, for example, of those who were advocates of judicial self-restraint prior to 1937 and then suddenly found themselves defending judicial activism (while concurrently groping for a principled way in which to explain the abrupt reversal of their judicial philosophy), might have been avoided. Much of the embarrassment and hypocrisy that developed reflected the inability and unwillingness of scholars and judges to confront the essential role of the Court. Constitutional principles (such as, for example, "preferred freedoms") were usually derived from the approach to judicial power that required a defense. The reverse process, however, should have occurred. Any particular approach to judicial power ought to be derived from a constitutional principle (which, more than the approach, requires defense), and the approach must therefore vary according to the circumstances surrounding the application of such principles.[155]

By focusing on the question of judicial power and discretion as the primary question, the New Deal Constitution did not, at least on these issues, give us firm constitutional footing so much as a perpetual constitutional debate. This is evident, as Ken Kersch argues, in the Black-Frankfurter debate over incorporation that we saw above. The debate between these justices over incorporation was a debate about how best to cabin judicial will, which lead both of them to slight and mischaracterize the earlier jurisprudence of John Marshall Harlan. While Harlan argued for incorporation, as Black draws upon and as Frankfurter dubs

"eccentric," he did not limit himself to incorporating the Bill of Rights by way of the 14th Amendment. Rather, he drew as well on notions of natural rights and the Anglo-American tradition. Harlan was preoccupied by constitutional principle and let the judicial role flow from such precepts.[156] The New Deal justices reversed this order: constitutional interpretation was first and foremost about grounding judicial will. Thus it is difficult to speak of the New Deal Constitution as a regime that gives us constitutional guidance. Or, perhaps more aptly, at the heart of this regime lay an unsettled question about the proper scope of judicial power that became the essentially contested constitutional question for the next several decades. The point is important insofar as it suggests that subsequent constitutional developments, *Roe v. Wade* for instance,[157] are not easily rooted in the Constitutional Revolution of 1937. Revisionist attempts to elide the old equation of if *Roe*, then *Lochner*, remain troublesome if we take the Constitutional Revolution of 1937 seriously. There may well be no going back to *Lochner*—whose foundations are long since gone—but that doesn't make for an easy fit between *Roe* and the New Deal.[158] Justice Black's firm equation of *Griswold* and *Lochner*, which is the precursor to just this argument, has its feet

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[155] Jacobsohn, *Pragmatism, Statesmanship, and the Supreme Court*, 171-172. In a similar fashion Whittington's argument for originalism begins from constitutional principle and is thus quite different than conservative arguments for originalism like Bork and Scalia's, *Constitutional Interpretation.*

[156] Kersch, *Discontinuous Development*, 119-123.

[157] *Roe v. Wade*, 410 U.S. 113 (1973).

[158] It also need not reject liberty of contract in all its forms.

solidly in New Deal constitutionalism.[159] This is also true, I want to suggest, of the rise (or return) of original intent. On this issue, originalism is very much a product of 1937 as it is driven by the need to ground judicial will.

Griswold, if we let it stand in for a general debate, highlights the discontinuities at the heart of the Constitutional Revolution of 1937. In the wake of *Griswold* (and *Roe*), we see the reemergence of fundamental rights jurisprudence that moves beyond constitutional text, but this emergence is precisely what brings back questions of natural rights (including liberty of contract) and draws us back to *Lochner*. And it is precisely this, drawing on part of the constitutionalism of the New Deal, which inspires the originalism of a Judge Bork.[160]

In his opinion for the Court, Justice Douglas posits a right to privacy against governmental intrusion, but attempts to ground that right in the "penumbras, formed by emanations from those guarantees" in the Bill of Rights.[161] Douglas' move is symbolic of the New Deal's constitutional change: rather than placing the burden on state regulation—what is the basis for the state's prohibition of contraception between married couples?—he assumes the legitimacy of regulation unless it violates a specific right. Douglas engages in a

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[159] Dissenting in Roe, Justice Rehnquist drew attention to this fact: "while the Court's opinion quotes from the dissent of Mr. Justice Holmes in Lochner, the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case." *Roe* at 174.

[160] Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990). Keith Whittington's more recent argument for "original intent" moves some distance from Bork precisely in that it is not preoccupied by grounding judicial will, but discovering constitutional principles. Thus Whittington unlinks constitutional interpretation from questions of the judicial role. *Constitutional Interpretation.*

[161] *Griswold* at 484.

tortured construction of penumbral rights to meet this challenge. His refusal to draw on the due process clause is a direct result of the New Deal criticism of *Lochner*: he is all too aware that any move in that direction will be open to the challenge that he is glossing the word liberty in the Fourteenth Amendment to align with his own political preferences, leaving his judicial will untethered. Thus he seeks—albeit unpersuasively—to ground privacy in the emanations from the text of the Bill of Rights, insulating him from the charge of Lochnerizing. Indeed, Douglas opened his opinion with just this in mind: "We are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that Lochner v. New York should be our guide. But we decline that invitation[.]"[162] Given this, it's not a coincidence that Justice Black's scathing dissent virtually ignores Douglas' opinion and saves its ire for the concurring opinions of Goldberg, White, and Harlan, who draw on the Ninth Amendment notion of unenumerated rights (Goldberg) and the due process clause of the Fourteenth Amendment (White and Harlan) to find the law unconstitutional. For Black, Douglas' opinion might be a poor interpretation of the Bill of Rights, but at least it had the virtue of attempting to ground the right to privacy in constitutional text, thus disciplining judicial will. The concurring opinions, on the other hand, let judicial will roam at large: "If these formulas based on 'natural justice,' or others which mean the same thing are to prevail, they require judges to determine what is or is not constitutional on the basis of

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[162] Ibid. at 481-482.

their own appraisal of what laws are unwise or unnecessary." [163] Black explicitly accuses these justices of Lochnerizing:

> The Due Process Clause with an 'arbitrary and capricious' or 'shocking the conscience' formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, e.g. Lochner. That formula, based on subjective considerations of 'natural justice,' is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like West Coast Hotel Co.[164]

Justice Harlan levels a similar charge, if more subtly and indirectly, at Douglas and Black as well. Harlan notes that the common link between Douglas' majority opinion and Black's dissent is a belief that by limiting the due process clause's meaning to the Bill of Rights,

> judges will thus be confined to 'interpretation' of specific constitutional provisions, and will thereby be restrained from introducing their own notions of constitutional right and wrong into the 'vague contours of the Due Process Clause. While I could not more heartily agree that judicial 'self-restraint' is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula for achieving it is more hollow than real. 'Specific' provisions of the Constitution, no less than 'due process,' lend themselves as readily to 'personal' interpretations[.][165]

One need look no further than Douglas' opinion to confirm this point. Harlan then went on to make a point reminiscent of Frankfurter, "Judicial self-restraint will not, I suggest, be brought about in the 'due process' area by the historically

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[163] Ibid. at 511-512.

[164] Ibid. at 522.

[165] Ibid. at 500-501.

unfounded incorporation formula. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie society, and wise appreciation of the great role that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."[166] For Harlan, as for Frankfurter, judicial will is more likely to be disciplined by judicial temperament, than by textual interpretation, which gives his approach a gloss of "substantive due process."

All of the opinions in *Griswold* are preoccupied by the need to discipline judicial will in light of this critique.[167] Yet it is precisely this skepticism about untethered judicial will that inhibits the development of a consensus regarding the protection of fundamental rights. As Gillman argues, "The same skepticism that called into question the ability of judges to discern true public purposes has been deployed against judges who struggle to identify fundamental rights."[168] Gillman chastises critics of the Court, especially conservative critics, who "use the lore of *Lochner* as a weapon in their struggle against the modern Court's use of fundamental rights as a trump on government power."[169] This conservative

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[166] Ibid at 501. Although it's unlikely that Frankfurter would have joined Harlan's opinion.

[167] This is true of Goldberg as well, "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and conscience of our people' to determine whether a principle is 'so rooted . . . as to be ranked fundamental.'"

[168] Gillman, *The Constitution Besieged*, 204.

[169] Ibid., 205.

critique, however, is rooted in the Constitutional Revolution of 1937.[170] That revolution, with the dramatic expansion of state power, made the search for fundamental rights essential, but given its professed skepticism of judicial power, it made this very search for any kind of grounding uneasy at best. The emergence of original intent in the wake of *Griswold* and *Roe*, and its search for solid constitutional footing, is informed by the putative lessons of 1937. While a leading legal scholar finds it odd that a conservative like Bork would expresses concern about the countermajoritarian nature of judicial review,[171] this is not particularly perplexing. Bork was weaned on the post 1937 critique of the *Lochner* Court: having fully digested that critique he was more than ready to apply it to the modern Court's privacy decisions.[172] The primary defense of originalism for leading exponents like Bork and Raoul Berger, after all, is that it grounds judicial discretion.[173] Originalism is the best theory of interpretation, not in its own right, but because it is the only theory for these proponents that successfully grounds judicial will by providing the judge with a neutral basis for interpretation. The construction of constitutional meaning, here, is being driven by the dilemma of judicial will. Indeed, the current Court's most powerful

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[170] While Bork is skeptical of the abandonment of constitutional federalism in the New Deal years, he is fully behind the need to limit judicial will. *The Tempting of America*, 57.

[171] See Friedman, "The Birth of an Academic Obsession," 253-254.

[172] Particularly, we might add, as he did not share the legal liberal's dilemma of liking the result, but disliking the reasoning. For this dilemma, see Friedman, "The Birth of an Academic Obsession," and Kalman, *The Strange Career of Legal Liberalism*.

[173] "Yet legal reasoning must begin with a body of rules or principles or major premises that are independent of the judge's preferences. That, as we have seen, is impossible under any philosophy of judging other than the view that the original understanding of the Constitution is the exclusive source for those exterior principles." Bork, *The Tempting of America*, 265. See also, Berger, Government by Judiciary.

articulator of original intent, Justice Scalia, defends originalism in precisely these terms. "Now the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge; perhaps no conscientious judge ever succeeds entirely."[174] Originalism, while not perfect, is the best method of interpretation because it "does not aggravate the principal weakness of the system [judicial discretion], for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[175] Scalia even goes so far as to call originalism the "lesser evil." It too suffers, as all theories must, from the dilemma of judicial will, but, all things considered, it is more likely to overcome this very dilemma. If these originalists draw on the ghost of *Lochner* to criticize *Roe*, it is because they have digested a central tenet of the "Constitutional Revolution of 1937."

In doing so, their originalism may well owe more to the legal positivism of Oliver Wendell Holmes than to the jurisprudence of John Marshall, but this only reaffirms the notion that they are firmly planted within New Deal constitutionalism. Those who argue that the conservative insistence upon original intent, as it pleads for judicial restraint and deference to democratic majorities,

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[174] Scalia, "Originalism: The Lesser Evil."

[175] Ibid.,

has little grounding in the Founding may be on solid ground.[176] These concerns stem not from the notion of limited governmental powers and unenumerated rights of the Founding, but from the New Deal critique of the Old Court. Thus Gillman is especially persuasive in arguing that the attempt by contemporary conservatives to enlist Marshall as a proponent of judicial restraint and democratic deference won't wash with the historical record.[177] In this Marshall's originalism is better exemplified by a Justice Sutherland than a Judge Bork.[178] And this is so because Bork has digested the central jurisprudential problem post 1937. The deep skepticism—almost closet nihilism—that any attempt to go beyond the Constitution to articulate its values, is to impose judicial values upon the Constitution, is precisely the argument leveled at Sutherland's gloss on liberty under the Fourteenth Amendment by Frankfurter, Stone, and Black. In this, Bork moves in stride with these justices—his jurisprudence is reared on their central critique of judicial power.[179] Gillman insists that this conservative critique of judicial activism is unfounded, as the judicial articulation and defense of rights has a deep foundation in American constitutionalism, rather than being the creation of the modern Court (as Bork would have it). Again, as a matter of

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[176] Gillman, "The Collapse of Constitutional Originalism," Macedo, *The New Right v. the Constitution*, Sotirios Barber, *The Constitution of Judicial Power* (Baltimore: Johns Hopkins University Press, 1993).

[177] Gillman, "The Struggle Over Marshall and the Politics of Constitutional History," *Political Research Quarterly*, 878.

[178] And, not surprisingly, Bork is ambivalent about Marshall on this score, calling him the "divided" John Marshall for just these reasons. *The Tempting of America*, 20-26.

[179] Bork, The Tempting of America, 81.

history, Gillman is persuasive. Yet, given the constitutional changes wrought by 1937, this new form of originalism may be even more resonant.

It's ironic, no doubt, that the new originalists might not be good originalists, but, in a way, this may make their criticism of *Griswold* and *Roe* more powerful, not less so. If 1937 was truly the collapse of constitutional originalism, rejecting the judicial limitation of governmental power, then the jurisprudence of a Bork is one plausible outcome of that change. Bork's insistence, for example, that the judiciary should defer to governmental power unless an individual has a textually enumerated right that trumps governmental power is a product of the New Deal constitution, which recognizes unlimited governmental power and limited individual rights. If the New Deal is seen as a constitutional revolution that embraced a change in constitutional regimes, as Ackerman argues, this is even more so. While Ackerman tries to rescue *Griswold* and *Roe* by insisting that they are part of the New Deal constitutional "synthesis," he doesn't tie them to the New Deal's constitutional change in a persuasive way. The difficulty is that very little that was settled in this constitutional shift justifies either opinion, while there is much at the heart of that revolution that squarely rejects such thinking. Gillman is on far more solid ground in suggesting that this constitutional change made the quest for the judicial articulation of fundamental rights necessary—if, that is, we are to rescue the individual from overarching state power. But the New Deal did not settle this question. It left us, rather, with a variety of possibilities that we have continued to argue over and contest in the absence of a constitutional consensus. If this requires conservatives to give a more

thorough political justification for their view of judicial power, this is just as true of progressives. If conservatives cannot simply call "original intent" in their critique of *Roe*, neither can progressives call "Carolene Products" in its defense. It is my contention that the deep skepticism of judicial discretion at the heart of the Constitutional Revolution of 1937 exacerbated this problem. By making judicial will the central question of constitutional interpretation, the constitutional change of this period made it unlikely that such a consensus could develop. The unsettled nature of fundamental rights in the post 1937 era, and the continued acrimonious debate with charges of judicial "law making," are as much a part of the New Deal inheritance as is the dramatic expansion of governmental power.

Conclusion

Viewed through the lens of constitutional settlement, we might see the "Constitutional Revolution of 1937" as part of an ongoing struggle. Facing backward, the New Deal may well be seen as the culmination of decades of constitutional struggle over governmental power to regulate the economy. Here traditional accounts might blend with revisionist accounts to recapture the essentially contested nature of constitutional meaning during this period, with the Court itself offering conflicting opinions. Revisionists reveal the power of legal thought during this era (even if the foundations of that thought were crumbling), while traditionalists remind us of fluctuating Court opinions that were very often at odds with one another. This conflict came to an end as the Court moved into line with the political branches and cleared the way for the expansion of state power. Although here, too, this struggle would resume with the return of

constitutional federalism in the Reagan years. Still, this constitutional question was settled for decades. Yet, facing forward, it is this very settlement that leaves the nature of the Court's role in relation to constitutional rights in an essentially contested and unsettled state. The New Deal regime—if it can even be called that—does not settle such questions, even if it forces us to take them up.

To come to a constitutional settlement or consensus on constitutional rights, the ghost of *Lochner* may need to be overcome. As Gillman argues, in forging our own definition of constitutional rights we cannot simply draw on the past. Yet Gillman himself, and other revisionists, echo a progressive view of rights that, albeit tacitly, reinforces the traditionalist critique of the Old Court that continues to give *Lochner's* ghost resonance. As these tensions at the heart of the New Deal come to a head with the return of "substantive due process," originalists are deeply connected to this historically trajectory. The ensuing struggle is in many ways a replay of the constitutional debates of 1937. Not only did Justice Scalia's dissent in the most recent "substantive due process" case accuse the Court of abdicating its neutral role in constitutional interpretation, it accused the Court of usurping the democratic process by creating new rights. Turning to the question of fundamental rights, Scalia argued, "We have held repeatedly . . . that only fundamental rights qualify for this so-called heightened scrutiny protection—that is, 'rights which are deeply rooted in this nation's history and tradition.'"[180] We hear not just the faint echoes of New Deal jurisprudence in Scalia's reasoning, but as I argue more fully in the next chapter, a

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[180] *Lawrence v. Texas*.

hearty-synthesis of Justices Black and Frankfurter which is fundamentally preoccupied by tethering judicial will to text and tradition as originalism draws deeply on the putative lesson of the "Constitutional Revolution of 1937."

CHAPTER 5

UNSETTLING THE NEW DEAL: REAGAN'S CONSTITUTIONAL RECONSTRUCTION

Ronald Reagan consciously drew parallels between himself and Franklin Delano Roosevelt. So much so, in fact, that after his acceptance speech at the 1980 Republican Convention, the *New York Times* lead editorial ran under the title: "Franklin Delano Reagan."[1] But as William Leuchtenburg writes, "Reagan presented himself as Rooseveltian . . . not in order to perpetuate FDR's political tradition but for exactly the opposite purpose: to dismantle the Roosevelt coalition."[2] Indeed, we might push this even further: Reagan did not simply seek to break the New Deal coalition to create one of his own, as the New Deal party system was already under stress. Far more ambitiously, Reagan sought to unsettle the "Constitutional Revolution of 1937"[3] and reconstruct our constitutionalism. Or, as Reagan himself put it, much like FDR before him had, he sought a return to constitutional first principles, which the New Deal had fallen away from and the Supreme Court had sorely distorted beyond recognition. Here the parallel between Reagan and FDR is striking. Reagan was the first president since FDR to insist that he had the authority to interpret the Constitution in his own right and was not bound by Supreme Court opinions. Much like FDR, in articulating his own constitutional vision Reagan was prepared to wrestle with the Supreme Court for

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[1] Quoted in Sidney Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal* (New York: Oxford University Press, 1993) 263.

[2] William Leuchtenburg, *In the Shadow of FDR: From Harry Truman to Bill Clinton* (Ithaca: Cornell University Press, 1993) 225.

[3] William Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995) 213.

constitutional authority as he flatly rejected the notion that he was bound by the Supreme Court's reading of the Constitution as handed down in its opinions.

This chapter takes up Reagan's attempted constitutional reconstruction. While Reagan has been treated as a "reconstructive" president,[4] a president who attempted to "engage the nation in a struggle for its constitutional soul,"[5] the so-called Reagan Revolution is by and large seen as a stalled constitutional revolution because it did not bring about the kind of constitutional reconstruction or transformation that FDR's New Deal wrought. Even if true, this overlooks an important point. The recognition that presidents play a profound role in constructing constitutional meaning is an important one that supplements our focus on the Court. Too often this is seen as great presidents transforming the Constitution in extraordinary moments of constitutional politics;[6] yet Reagan unsettled the existing order without bringing on a full-scale constitutional transformation. As we have seen in the last several chapters, constitutional change and discontinuities come in more subtle forms. Constitutional politics plays out through the ordinary political process without leading to grand constitutional transformation.

On federalism and the enumerated powers of the national government, Reagan articulated a constitutional vision that was at odds with the "Constitutional Revolution of 1937," and one that, after a lag, the Rehnquist

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[4] Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to George Bush* (Cambridge: Harvard University Press, 1993) 416.

[5] Marc Landy and Sidney Milkis, *Presidential Greatness* (Lawrence: University Press of Kansas, 2000) 198.

[6] See especially Bruce Ackerman, *We the People: Transformations* (Cambridge: Harvard University Press, 1998).

Court began to articulate. Here, this chapter seeks to connect judicial appointments to questions of constitutional interpretation and development, what Bruce Ackerman has called "transformative judicial appointments."[7] Judicial appointments may not only serve as a way for the President to put forth his constitutional vision, but may, if successfully pursued, become the mechanism whereby he alters or overturns past Supreme Court opinions. The literature on judicial appointments is rarely integrated into larger questions of constitutional theory and development.[8] But the evidence is at least suggestive that Reagan's determination to overturn longstanding Supreme Court interpretations of the Constitution—and thereby articulate a "constitutional reconstruction"—has been partly accomplished by his Rehnquist Court appointees.

How judicial appointments are connected to questions of constitutional interpretation is a neglected area of study in the debate about judicial supremacy. If we look only at Supreme Court opinions, we are likely to see the judiciary settling constitutional issues (if the other branches remain silent). But this misses the larger background. The Court's opinions may be based on the President's constitutional vision. So even if we have the appearance of judicial supremacy, the political branches may be behind it. It is not without irony that the Reagan Justices have been the most vocal articulators of judicial supremacy in recent years, despite the fact that the President who appointed them rejected this very

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[7] Ackerman, *We the People*, 26.

[8] In pursuit of what Sheldon Goldman calls a president's "policy agenda." Goldman, *Picking Federal Judges: Lower Court Selection From Roosevelt to Reagan* (New Haven: Yale University Press, 1997) 3. See also Terri Perreti, *In Defense of a Political Court* (Princeton: Princeton University Press, 1999) who makes this connection explicit.

notion. Even so, Reagan's constitutional vision has found acceptance by the justices who have revived a judicial defense of constitutional federalism. This suggests that the executive may play a central role in determining constitutional meaning even in the absence of a great "constitutional moment."

While the Rehnquist Court has begun articulating Reagan's view of federalism, and thereby reopened constitutional questions that have been settled since the New Deal, it is not clear that Congress has accepted the Court's limitations on its power under the guise of federalism, or, for that matter, the Court's claims to judicial supremacy. Reagan unsettled these meanings. They remain, though, in state of constitutional flux revealing how constitutional politics play out on a smaller scale, with constitutional meaning in an unsettled state.

Presidential Reconstruction and Constitutional Politics

The President's connection with constitutional maintenance has long been recognized by presidential scholars, even if it has not been fully integrated into much of public law scholarship.[9] In *The Federalist Papers*, Alexander Hamilton insists on the necessity of executive independence as a way to preserve the Constitution against the transient whims of the public as well as legislative aggrandizement.[10] This comes from the man who insisted in *Federalist 78* that "the complete independence of the courts of justice is peculiarly essential in a

[9] Keith Whittington, "The Political Foundations of Judicial Supremacy" in Sotirios Barber and Robert P. George, eds., *Constitutional Politics: Essays on Constitutional Making Maintenance, and Change* (Princeton: Princeton University Press 2001) is one such attempt. Earlier studies, like Robert Scigliano's *The President and the Supreme Court* (New York: Free Press, 1971) drew on the special connection, but largely deferred to judicial supremacy.

[10] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Mentor, 1999) No. 71 and 73, 400 and 410. See also, Jeffrey Tulis, *The Rhetorical Presidency* (Princeton: Princeton University Press, 1986) 39-40.

limited Constitution."[11] Public law scholars—and especially legal scholars—remain fixated on *Federalist 78*, insisting that the judiciary is the final arbiter of constitutional meaning. Indeed, when Reagan's Attorney General Edwin Meese announced that the President could interpret the Constitution in his own right and was not, therefore, bound by judicial opinions in the broad sense of adhering to them as a matter of constitutional principle,[12] many in the legal academy acted as if Meese was out to subvert—rather than maintain—constitutional government.[13] Yet Meese's claim on Reagan's behalf was consistent with the claims of past presidents and part of a robust lineage in constitutional interpretation. It shouldn't escape notice that all of the agreed upon "great presidents" were departmentalists when it came to constitutional interpretation. Jefferson, Jackson, Lincoln, and FDR all claimed the power to interpret the Constitution independently of Supreme Court opinions. Jackson, Lincoln, and FDR confronted the Supreme Court directly, arguing that they were not bound by specific Supreme Court opinions. It's not just that they ventured—as a matter of constitutional theory—that they were capable of independent constitutional interpretation; rather, they struggled with the Court for constitutional authority. And, not coincidentally, such struggles "reconstructed" our constitutionalism.[14] Stephen Skowronek's reconstructive presidents "reset the very terms and conditions of constitutional government";

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[11] *Federalist 78*, 434.

[12] Edwin Meese III, "Perspective on the Authoritativeness of Supreme Court Decision: The Law of the Constitution" *Tulane Law Review* 61: 979 (1987).

[13] Ronald Dworkin, *Freedom's Law* (Cambridge: Harvard University Press, 1996) (essays that originally appeared in the New York Review of Books); Laurence Tribe, *Constitutional Choices* (Cambridge: Harvard University Press, 1985).

[14] Skowronek, *The Politics Presidents Make,* 39.

Mark Landy and Sidney Milkis's great presidents "taught the citizenry about the need for great change but also about how to reconcile such change with American constitutional traditions and purposes."[15] Bruce Ackerman has connected such presidential struggles with dramatic constitutional change leading to the creation of new constitutional regimes.[16] In a similar vein, Keith Whittington has suggested that "reconstructive" presidents have a unique capacity to challenge judicial supremacy and "play the role of constitutional prophet."[17] While Skowronek and Landy and Milkis only touch on the Court incidentally, Ackerman and Whittington see the inherited Court, committed to the old regime, as the principal challenger to a president's ability to remake our fundamental constitutional commitments. Such moments of presidential reconstruction are extraordinary moments, after which the Supreme Court once again takes the primary responsibility for maintaining the Constitution. The cyclical unfolding of founding, decay, and regeneration places great presidents in the role of "perpetuator" of our "republican institutions." The common theme of the narrative is presidential interpretation as an extraordinary moment of constitutional politics, after which we return to a more ordinary politics. There is a good deal of truth to this, especially the recognition of punctuated moments of constitutional change, but it misses the way significant constitutional change can come incrementally, absent extraordinary transformation or clear-cut political realignment, as we have seen in the last several chapters.

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[15] Landy and Milkis, *Presidential Greatness*, 4.

[16] Although Ackerman focuses only on Lincoln and FDR, neglecting Jefferson and Jackson, and explicitly arguing that Reagan's attempted transformation failed. *We the People*, 390-403.

Reagan is frequently placed along Jefferson, Jackson, Lincoln, and FDR as a departmentalist president who sought to refound our constitutionalism, but most view his attempt as falling short of past presidential re-orderings: "For all that the New Beginning changed the terms and conditions of national politics, it proved far less successful than the New Deal in reconstructing American government."[18] As Milkis and Landy put it, "Reagan's emphasis on presidential politics and executive administration relegated his administration to the task of managing—even reinforcing—the state apparatus it was committed to dismantling."[19] Ackerman speaks specifically of Reagan's "failed" constitutional transformation.[20] Concurrent with pronouncements of Reagan's failed constitutional reconstruction, legal scholars began speaking of the "Rehnquist Court's federalism revolution" as auguring a post-New Deal jurisprudence. Some directly accused the Court of "unconstitutionally" rejecting the New Deal's constitutional settlement, of reopening settled constitutional questions.[21] Others praised the Court for returning to the constitutional scheme of federalism.[22] In the 1995 case of *United States v. Lopez,* the Court did reject a congressional act as beyond the scope of the Commerce Clause for the first time since the New Deal

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[17] Whittington, "The Political Foundations of Judicial Supremacy," 274.

[18] Skowronek, *The Politics Presidents Make*, 428.

[19] Landy and Milkis, *Presidential Greatness*, 225.

[20] Ackerman, *We the People*, 391.

[21] Stephen Gottlieb, *Morality Imposed* (New York: New York University Press). Arguably, this is the message of Ackerman's *We the People* as well.

[22] Steven Calabresi, "Federalism and the Rehnquist Court: A Normative Defense" *The Annals of the American Academy of Political and Social Science* 574: 24 (2001)

revolution of 1937.[23] Are we living in a constitutional moment?[24] Just how far the Court's revival of federalism will reach remains to be seen, but since *Lopez* the Court has continued down this path. Nearly all agree that we are in a transitory period, even while disagreeing on whether it is a major constitutional shift or a mild departure, a mere corrective that leaves the New Deal essentially intact.[25] More importantly, there seems to be a consensus that the emerging constitutional debate must be measured against the backdrop of the New Deal, the last great constitutional moment in our history. Debates about the legitimacy of the Court's new federalism serve as a proxy, in some ways, for debates about the legitimacy of the New Deal state. If rather obviously, there is a connection between Reagan's

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[23] As an isolated case, which I take up below, Rehnquist's opinion for the Court in *National League of Cities v. Usery* (1976) held out limitations on Congress' power under the Commerce Clause, but did so indirectly by way of state sovereignty. Moreover, it was overturned nine years later by *Garcia*. Although, as I argue below, this was surely an initial probing that laid out Rehnquist's view of federalism, which the Court would start to fully and consistently articulate after *Lopez*.

[24] Mark Tushnet, "Living in a Constitutional Moment? *Lopez* and Constitutional Theory" *Case Western Reserve Law Review* 46: 845 (1996) and *The New Constitutional Order* (Princeton: Princeton University Press, 2003).

[25] To name but a few, Dean Alfange, Jr., "The Supreme Court and Federalism: Yesterday and Today" Robert Spitzer, ed., *Politics and Constitutionalism: The Louis Fisher Connection* (Albany: SUNY Press, 2000); Tinsley E. Yarbrough, *The Rehnquist Court and the Constitution* (New York: Oxford University Press, 2000); John Dinan, "The Rehnquist Court's Federalism Decisions in Perspective" *Journal of Law and Politics*, Spring 1999; Timothy Conlan and Francois Vergniolle de Chantal, "The Rehnquist Court and Contemporary American Federalism" *Political Science Quarterly* Volume 116 Number 2 (2001); Richard Fallon, "The 'Conservative' Paths of the Rehnquist Court's Federalism Decisions" *University of Chicago Law Review* 69: 429 (2002); J. Mitchell Pickerill and Cornell Clayton, "Politics and the Safeguards of Federalism During the Rehnquist Court" paper delivered at the American Political Science Association, Boston, MA, 2002; Thomas Keck, *The Supreme Court and Modern Constitutional Conservatism, 1937-2002* (Chicago: University of Chicago Press, forthcoming); Christopher Schroeder, "Causes of the Recent Turn in Constitutional Interpretation" *Duke Law Journal* 51: 307 (2001); Neal Devins, "Congress as Culprit: How Law Makers Spurred on the Court's Anti-Congress Crusade" *Duke Law Journal* 51: 435 (2001); Keith Whittington, "Taking What They Give Us: Explaining the Court's Federalism Offensive" *Duke Law Journal* 51: 477 (2001), all see the see the shift as significant, even while disagreeing profoundly over particulars. For an interesting demurer, see Robert Nagel, *The Implosion of American Federalism* (New York: Oxford University Press, 2001) who argues that nationalism reigns supreme and that the recent move to federalism is minor at best.

attempted constitutional reconstruction and the revival of federalism on the Rehnquist Court: four of the five justices behind the revival were appointed by Reagan and the fifth was appointed by George Bush senior, "faithful son" of the Reagan Revolution.[26]

Reagan's Reconstruction

Reagan was the first president living in the shadow of FDR who squarely rejected the New Deal state. Flipping FDR on his head, in his first inaugural address Reagan insisted that "In the present crisis, government is not the solution to our problem; government is the problem." The election of 1980 brought federalism and the notion of a limited government of enumerated powers back to the political agenda in a way that challenged the continuing validity of the New Deal administrative state; it looked like the long-awaited political realignment. The first full year of the Reagan administration seemed to fulfill this promise as Reagan pushed through sizeable tax cuts and a reduction in government expenditures, aiming specifically at rolling back the New Deal state. Comparisons to FDR and the 100 Days Congress were inevitable. Yet the Reagan Revolution seemed to stall in the election of 1984. Reagan won a landslide victory, but the Republicans failed to gain control of the House of Representatives. Reagan's personal victory was not translated into a constitutional transformation that dramatically rejected New Deal constitutionalism. In 1986, Democrats won back

[26] Skowronek, *The Politics Presidents Make*, 429.

control of the Senate and the Reagan Revolution fizzled out in the scandal of Iran-Contra.[27]

Reagan was able to challenge the New Deal Constitution in part because it was already showing signs of strain. Indeed, as I argued in the last chapter, the New Deal Constitutional order was perplexed by deep incongruities at its heart, which was made evident in the constitutional debates over *Griswold* and *Roe* that I will take up more fully below. The New Deal order appeared to be degenerating, as the administrative state seemed unwieldy and the political coalition that sustained FDR began to disintegrate, which made reconstructive efforts timely. Some scholars of political realignment pronounced the New Deal coalition dead in 1968, if not earlier. Nevertheless, even Nixon, who insisted upon a "strict construction" of the Constitution and spoke more actively of federalism than any president until Reagan, never questioned the fundamentals of the New Deal constitutional order in terms of governmental power. It has even been suggested that Nixon was the last New Deal president.[28] Thus the New Deal order remained coherent in terms of governmental power, but was beset with tension from the outset in the realm of "civil liberties."

In this way it is difficult to merge the Warren Court with the New Deal order; rather, the Warren Court brought out the tensions in New Deal constitutionalism and revealed how Lyndon Johnson's Great Society followed the path of the New Deal in one area (national regulation) and inherited its

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[27] Reagan's election may look more like 1896 than 1932 if it ushers in a period of constitutional uncertainty much like 1895-1925, rather than the sharp change of 1935-1941.

[28] Milkis, *The President and the Parties*, 228.

discontinuities in another (the role of the Court in relation to civil liberties). Thus, the so-called New Deal Constitution was already revealing unsettled constitutional issues in some areas with consensus in others.[29] Against this backdrop of discontent with the New Deal order Reagan offered a limited constitutional vision, which required less from government; indeed, as I have already noted, he wanted to "get the government off the people's backs." In this, he was more like Jefferson and Jackson than FDR. Accomplishing this constitutional change required an alteration in public expectations: the people must demand less of the national government; they must be weaned away from national administrative programs. In some ways, such a project seemed well suited to Reagan's rhetorical leadership, itself an outgrowth of the modern presidency, rather than the earlier style of Calvin Coolidge whom Reagan often trumpeted as an ideal president. And to a degree Reagan succeeded.[30] It was the Democratic President Bill Clinton, after all, who pronounced the "the era of big government is over" and ended welfare as we know it, while his greatest failure as president was the New Deal-style attempt at government-mandated universal health care. If Reagan didn't bring about a Republican realignment, he seems to have changed the ideological dimension of both parties in a more conservative

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[29] Tushnet attempts to merge the Great Society and New Deal as a single constitutional order, which neglects the way in which ordinary political change—even simple judicial appointments—helped bring in constitutional change that revealed the tensions at the heart of the New Deal. See his *The New Constitutional Order*. On judicial appointments and the Great Society, see Goldman, *Picking Federal Judges*, 154-197.

[30] Tulis, *The Rhetorical Presidency*, 181, goes so far as to say that "Democrats now talk like Republicans." While this was certainly true of New Democrat presidential contenders, it is arguably less so of Congressional Democrats, or those seeking to run as president after Bill Clinton.

direction.[31] At the same time, using the tools of the New Deal—a reliance on administration and the courts to bring about constitutional change—Reagan seemed trapped by the old order and unable to reconstitute the government's fundamental commitments.[32] Here Reagan failed to bring about his whole constitutional vision in an immediate way. Still, the Reagan Revolution succeeded in reopening a debate about the terms of our constitutionalism and placed the legitimacy of the New Deal Constitution squarely at the center of this debate—a debate that is very much alive.

In this, Reagan did instigate a constitutional revolution of sorts. Or, perhaps more aptly, he succeeded in unsettling fundamental constitutional questions that had been settled by the politics of the New Deal. Whether he is a "reconstructive" president may remain to be seen, but he surely disrupted the old order, leaving the contours of our constitutionalism the subject of intense debate (which is true of FDR as well on many constitutional issues). Reagan did this, moreover, in an area that cut to the heart of the New Deal: federalism. And, what is more, he did it in a peculiarly New Deal style: by way of transformative judicial appointments. Ackerman himself argues that one of the fundamental changes wrought by the New Deal was the "self-conscious use of *transformative judicial appointments* as a central tool for constitutional change."[33] Yet Ackerman paints Reagan's attempted constitutional transformation as a failure. Unlike Roosevelt,

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[31] At least at the presidential level, though this is not true at the congressional level and it remains to be seen if it will hold, as Al Gore ran to the left of Clinton in 2000.

[32] Skowronek, *The Politics Presidents Make*, 416-429 and Landy and Milkis, *Presidential Greatness*, 219-226.

[33] Ackerman, *We the People: Transformations*, 26 (italics in original).

Reagan did not win a solid Republican majority in the Congress in the 1984 election, and in 1986 the Republicans lost the Senate, which very likely resulted in the defeat of Reagan's nomination of Judge Robert Bork to the Supreme Court. Bork's confirmation, for Ackerman, combined with Reagan's earlier elevation of William Rehnquist to the Chief Justiceship and the appointment of Antonin Scalia to the Court, may well have culminated in a series of transformative constitutional opinions—namely the overruling of *Roe v. Wade*,[34] the Supreme Court's controversial 1973 opinion recognizing a woman's constitutional right to have an abortion. Instead, failing to win wide-spread support for his constitutional vision, Reagan was forced to appoint the more moderate Anthony Kennedy to the Court, who brought constitutional politics to a crashing halt when he joined Justice O'Connor, another Reagan appointee, and Justice Souter, a Bush appointee, in a plurality opinion upholding *Roe* in *Planned Parenthood v. Casey*—or so Ackerman suggests.[35]

What is odd about Ackerman's argument is that he sees the failure to overturn *Roe* as a rejection of Reagan's constitutional vision. The New Deal Constitution stands because the Reagan Revolution failed. But *Roe* itself is hard to reconcile with the New Deal constitutional regime. If anything, *Roe* highlights the discontinuities in New Deal constitutionalism making it difficult, as the last chapter suggested, to speak meaningfully of a New Deal constitutional regime. Nothing in the New Deal constitutional revolution justified the Court's opinion in *Roe*, which embraced the very substantive due process arguments that the Court

[34] *Roe v. Wade*, 410 U.S. 113 (1973)

had rejected in 1937, clearing the way for the New Deal.[36] Indeed, at the center of the New Deal was a need to tether judicial power against the kind of reasoning (so to speak) we see in *Roe*. Dissenting in *Roe*, Justice Rehnquist drew attention to this fact: "while the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner*, the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case."[37] Rehnquist's dissent echoed Justice Hugo Black's Griswold dissent that I discussed in the last chapter. Let me quote Black again:

> The Due Process Clause with an 'arbitrary and capricious' or 'shocking the conscience' formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, e.g. Lochner. That formula, based on subjective considerations of 'natural justice,' is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like West Coast Hotel Co.[38]

The return of substantive due process in *Roe* highlighted the fractured state of New Deal jurisprudence and provoked many legal scholars who had been weaned on the New Dealer's critique of the old court—on the ghost of *Lochner*—to cry foul.[39] For New Dealers, *Lochner*—with its embrace of substantive due

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[35] *Planned Parenthood v. Casey,* 505 U.S. 833 (1992).

[36] *West Coast Hotel Company v. Parrish,* 300 U.S. 379 (1937).

[37] *Roe* at 174.

[38] *Griswold v. Connecticut* 381 U.S. 479, 522 (1965) (J. Black dissenting).

[39] Most notably John Hart Ely, who spun out Harlan Fiske Stone's famous *Carolene Products* footnote four into a full-fledged theory of judicial review in *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), objected to *Roe*. Ely argued that *Roe* was not just bad constitutional law, but not constitutional law at all. "The Wages of Crying

process—was synonymous with judicial lawmaking and a political Court. For all the tensions within New Deal jurisprudence, for all that it left unsettled, the retreat from substantive due process was a unifying theme.[40] Reagan's call for a return to a jurisprudence of "original intent" highlighted the tension between rejecting *Lochner* and embracing *Roe*, drawing heavily upon the condemnation of *Lochner* as handed down by the New Dealers themselves. As expounded upon by Bork and Scalia, originalism rejected the very notion of substantive due process whether of the *Lochner* or *Roe* variety, and in this way digested a central tenet of New Deal constitutionalism. For originalists, these decisions were of a piece, which placed these jurists squarely with the Constitutional Revolution of 1937 on this issue; that is, on the need to tether judicial will.[41] The preoccupation with reconciling judicial review with democratic government and the suggestion that any attempt to define substantive rights beyond constitutional text was all politics, were inheritances from the New Deal critique of the Old Court.[42] Having criticized the Court's use of judicial review as illegitimate, New Dealers became

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Wolf: A Comment *on Roe v. Wade*" 82 *Yale Law Journal* 920 (1973). See also, Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996) 1-10.

[40] Although this argument repeatedly flared up between Felix Frankfurter and Hugo Black. See Mark Silverstein, *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision-Making* (Ithaca: Cornell University Press, 1984) and C. Herman Pritchet, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* (Chicago: The University Press, 1948).

[41] Robert Bork, *The Tempting of America* (New York: Free Press, 1990) 57. "In my history-book, the Court was covered with dishonor and deprived of legitimacy by Dred Scott v. Sandford (1857), an erroneous (and widely opposed) opinion that it did not abandon, rather than by West Coast Hotel (1937), which produced the famous 'switch in time' from the Court's erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal." Scalia's originalism is a bit different than Bork's insofar as he has shown a willingness to draw on unenumerated rights that are clearly part of our history and tradition. See, e.g., Scalia's opinion in *Michael H. v. Gerald D.* 491 U.S. 110 (1989).

[42] See Holmes' dissenting opinion in *Adkins v. Children's Hospital* 261 U.S. 525 (1923).

preoccupied with grounding judicial review in a way that clearly limited judicial power. Let us recall Professor Herbert Wechsler's dilemma from the last chapter, "The problem for all of us became: How can we defend a judicial veto in areas where we thought it helpful in American life . . . and at the same time condemn it in the areas where we considered it unhelpful?"[43] Originalism's preoccupation with the legitimacy of judicial review—viewing it in countermajoritarian terms—and its attempt to ground judicial will in "original intent" draws squarely on this New Deal inheritance. Whether or not this is accurate constitutional history insofar as original intent itself is concerned, it was a forceful critique of *Roe* that illuminated its tensions with the New Deal regime—illuminated, in fact, the tension at the heart of the "Constitutional Revolution of 1937."[44] The New Deal constitutional order was coming apart, as the Court had already instituted constitutional change that fell away from its foundations (in part because those foundations were essentially contested from the beginning). Reagan's originalism was in part an attempt to recover constitutional foundations—albeit an attempt of a very different sort.

Reagan's originalism traveled easily with the New Deal's critique of *Lochner*, but it posed a challenge to the New Deal Constitution when it came to federalism. While the New Deal court abandoned substantive due process, it also embraced a far-reaching view of Congress' power to regulate interstate

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[43] Quoted in Leuchtenburg, *The Supreme Court Reborn*, 234.

[44] For an interesting take on constitutional Originalism and the rise of the New Deal see Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building" *Studies in American Political Development* 11: 149-189 (1997).

commerce, rejecting arguments that federalism or the Tenth Amendment were limitations on national power.[45] On these issues, Reagan's constitutional vision squarely challenged the New Deal Constitution and its institutional arrangements. As Bork described it, "The [New Deal] Court's refusal to enforce limits of any kind simply abandoned this aspect of the Constitution. That worked a revolution in the relationship of the federal government to the state governments and to the people, and the revolution did not have to await a constitutional amendment."[46]

By focusing on *Roe* and *Casey*, while neglecting the Reagan Court's federalism decisions, Ackerman is able to claim that the Reagan Revolution failed to legitimate constitutional change and, from there, claim that we are still living under the New Deal Constitution. This is troublesome because the link between *Roe* and the New Deal is specious. But more importantly, the resurgence of federalism represents a challenge to the New Deal order and shows signs that Reagan's challenge to that order was at least partly successful. In fact, Ackerman's scholarship in and of itself seems to reflect the potency of Reagan's challenge: by rooting our current Constitution in the New Deal, Ackerman proffers a sort of "New Deal Originalism" as a preemptive strike against Reagan's call for original intent, which rejected New Deal foundations when it came to federalism and limited government.[47] Reagan's failure to overturn *Roe* amounts,

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[45] See especially, *United States v. Darby* 312 U.S. 100 (1941).

[46] Bork, *The Tempting of America*, 57. See also, Raoul Berger, *Federalism: The Founder's Design* (Norman: University of Oklahoma Press, 1987).

[47] George Thomas, "New Deal 'Originalism'" *Polity* Vol. XXXIII, No. 1, Fall 2000. See also G. Edward White, *The Constitution and the New Deal* (Cambridge: Harvard University Press, 2000) 27. Indeed, Reagan's turn to original intent could be seen as widely successful in that it has reshaped the debate about constitutional interpretation. When the Reagan Administration brought "original intent" back to the table, the debate was often described as a debate between

then, to a failure to ratify his constitutional vision, which then makes the Rehnquist Court's departure from New Deal foundations "unconstitutional." Ackerman is surely right that Reagan failed on this count. But he makes too much of the failure. Reagan spoke often about overturning *Roe* and frequently criticized what he called judicial lawmaking. He insisted, again and again, that he would put men and women on the bench who would interpret the law rather than legislate—a clear criticism of *Roe*. Even so, such moves were largely rhetorical. Castigating the Court's judicial lawmaking was a sure and easy way to affirm Reagan's commitment to pro-lifers and religious groups. And while numerous scholars focus on this aspect of Reagan's constitutional vision, there is a danger of overplaying it.[48] As Landy and Milkis argue, "Reagan the divorce`, the TV huckster, the casual churchgoer, the signer of the California abortion bill coexisted uneasily with Reagan the Savonarola. As long as the Democrats kept control of at least one house of Congress, he did not need to resolve his ambivalence. He could continue to rhetorically support a whole host of conservative initiatives without having to actually put them into practice."[49]

"interpretivists" and "noninterpretivists." But in the wake of Reagan, we are all interpretivists now. Once powerful critics of Originalism like Ronald Dworkin now speak its very language. In a way the argument is over who has the better form of "Originalism." See Dworkin's *Freedom's Law* (Cambridge: Harvard University Press, 1996). See also, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998). Ackerman's scholarship itself should be placed in the context of American constitutional development, as his argument can only be understood against its trajectory.

[48] Donald Grier Stephenson, *Campaigns and the Court* (New York: Columbia University Press, 1999) focuses almost exclusively on the Court and abortion. James Simon's *The Center Holds* (New York: Simon and Schuster, 1996) speaks about the failure of the conservative revolution, but doesn't even have a chapter on federalism!

[49] Landy and Milkis, *Presidential Greatness*, 224. Which is not to say that Reagan wasn't committed to these socially conservative issues, but he seemed unwilling to spend political capital to achieve them.

Reagan's commitment to limited government and federalism, on the other hand, were at the very core of his political vision. Reagan and Meese's vision of originalism brings this out. What was most egregious about decisions like *Roe* was not that they allowed abortion; it was the fact that they removed the decisions from where they properly belonged: in the hands of the states. The states themselves might choose to allow abortion, but constitutional principles of federalism commanded that the issue be decided there and not by the Supreme Court.[50]

In the wake of *Casey*, Ackerman says, "we have returned to normal politics."[51] But this isn't true. Or, to vary the formula, ordinary politics itself contains constitutional politics, which we see in the realm of civil liberties under the New Deal regime, so it's not clear that we ever left such politics behind. Reagan and the Rehnquist Court are more likely just a particularly vivid and potent form of constitutional politics in an area that had been settled. The very same year that *Casey* was handed down, the Court reopened a debate on the meaning of the Tenth Amendment that had been settled since the New Deal.[52] Three years later the Court, in *Lopez*, clearly struck down a law as beyond the scope of Congress' Commerce Clause power for the first time since the New

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[50] David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* (Lawrence: University Press of Kansas, 1996), argues that Reagan supported many conservative amendments for the same kind of rhetorical purposes, 447-455.

[51] This isn't even true for abortion. In the 2000 partial birth abortion case, *Carhart v. Stenberg*, Justices Kennedy and O'Connor argued with one another over the very meaning of *Casey*. And the Congress passed the "Born Alive Infants Act" in July of 2002, which may well have dramatic ramifications for abortion.

[52] *New York v. United States* 505 U.S. 144 (1992). O'Connor's majority opinion on the Tenth Amendment does not easily square with *Darby*. Again, *Usery* foreshadows these opinions, but placed in context it seems an isolated case.

Deal. Since that time the Court has shown that it is willing to police the boundaries between the states and the national government: limiting Congress' power under the commerce clause,[53] breathing life into the Tenth Amendment,[54] and recognizing the sovereign immunity of the states.[55] Just how far the Reagan Justices of the Rehnquist Court will go is an open question, as is whether this line of federalism decisions will be solidified over time.

Reagan's Transformative Appointments

Much like Roosevelt before him, Sheldon Goldman argues that Reagan "self-consciously attempted to use the power of judicial appointments to place on the bench judges who shared [his] general philosophy."[56] In fact, Reagan saw a transformation of the judiciary as key to his political agenda and, in Goldman's terms, policy considerations drove his judicial appointments. Unlike Roosevelt, the Court did not play spoiler to Reagan directly. To return to a more limited vision of government, the administration could cut government spending and taxes and let the states and local governments take up their more traditional roles. As long as the government acted in such a fashion, it could bring about significant change without confronting the Court. So while Reagan articulated a departmentalist vision, he was not forced to act on it directly. Yet absent a significant change in our constitutional vision or a fundamental change on the

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[53] *Lopez* and *United States v. Morrison* 529 U.S. 598 (2000).

[54] *New York v. United States* and *Printz v. United States* 521 U.S. 898 (1997).

[55] *Seminole Tribe of Florida v. Florida* 517 U. S. 44 (1996); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* 527 U.S. 627 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* 527 U.S. 666 (1999); *Alden v. Maine* 527 U.S. 706 (1999); *Kimel v. Florida Board of Regents* 528 U.S. 62 (2000); *Trustees of the University of Alabama v. Garrett* 531 U.S. 356 (2001);

Court, Reagan's return to limited government would be transitory rather than foundational. To solidify a return to "dual sovereignty," he turned to judicial appointments. His quarrel with the Court was largely rhetorical, insisting that it let states and local governments return to their traditional functions. The Supreme Court opinions he was most critical of—those forcing school busing, forbidding prayer in public schools, and nationalizing abortion and criminal rights—prevented the states from making choices he thought they were constitutionally vested with the power to make. This required a change in judicial philosophy: getting justices to police the boundaries of federalism in a way that hadn't been done since the pre-New Deal years. The rhetoric, much like Roosevelt's before, was an insistence on judicial restraint: let state legislatures make these decisions, not federal courts. Judicial restraint, though, was only part of the picture. At the national level a constitutionally mandated return to federalism might require a much more active judiciary. If the national government had a broader vision of its constitutional power than the Reagan administration did, it would very likely come into conflict with a Court dedicated to federalism. Perhaps more than any administration since FDR's, Reagan was committed to this jurisprudential shift; indeed, the administration started vetting candidates for the Supreme Court before there were even any vacancies.[57]

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[56] Sheldon Goldman, *Picking Federal Judges,* 285.

[57] David Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago: University of Chicago Press, 1999) 143. David O'Brien suggest that the Reagan judges may well be his most enduring legacy, "The Reagan Judges: His Most Enduring Legacy?" Charles O. Jones, ed., *The Reagan Legacy: Promise and Performance* (Chatham: Chatham House Publishers, 1988). See also Goldman, *Picking Federal Judges*, 285-345

Reagan's reliance on judicial appointments to bring about constitutional change was in part due to the fact that he was not in direct conflict with the Court. But it also reveals the degree to which Reagan was working within an inherited institutional order even while attempting to change that very order. To alter the existing constitutional order, Reagan worked primarily through the instruments of the modern executive: through administration and presidential rhetoric, not large-scale legislative change. These instruments are part of the most profound constitutional change of the twentieth century and Reagan's use of them to foment constitutional change reflected just how rooted FDR's administrative executive was.[58] Through judicial appointments, the Department of Justice, Office of Legal Policy, and by way of executive orders and presidential signing statements, Reagan attempted to shift constitutional thinking in legal terms.[59] And while Reagan criticized a "political" Court, most of the action was contained in the legal arena—the stuff of lawyers and courts, not high-level constitutional politics.[60] Reagan's rhetorical efforts seemed to promise more.

Here again, Reagan embraced the modern presidency: he was *the* rhetorical president.[61] But there was a twist. Reagan's rhetoric, unlike many modern presidents, raised "important constitutional concerns."[62] Of course, Reagan also used rhetoric to mobilize and flatter his political supporters. (One

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[58] Milkis, *President and the Parties.*

[59] See Kenneth Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton: Princeton University Press, 2001).

[60] What Cornell Clayton calls the "judicialization of politics." *The Politics of Justice: The Attorney General and the Making of Legal Policy* (New York: M.E. Sharpe, 1992) 146-155.

[61] Tulis, *The Rhetorical President*, 189-202

[62] Ibid. 192.

wonders, even, if much of his constitutional rhetoric on abortion and the like was of this nature.) Reagan's rhetoric provoked a constitutional debate that freed his administration from the Court monopoly of constitutional norms. Much of Reagan's rhetoric in this regard seemed to be precisely so that the administration could offer its own constitutional views independently of what the Court had said or done. Most famously, Reagan insisted that he was not bound by Court opinions on constitutional questions and could—in fact, *must*—interpret the Constitution independently of Supreme Court opinions.

Like Lincoln before him, Reagan did not reject Court opinions as binding on the parties to the case, but he rejected the broader rule that the Court had articulated most forcefully in *Cooper v. Aaron*, that once the Court has spoken on a constitutional issue, it definitively settled that issue for all the branches of government.[63] This line of reasoning was explicitly rejected by Attorney General Meese, who set off a maelstrom by rather innocuously arguing that the duty to interpret the Constitution is a duty of all the branches of government and not just a duty of the Court. Meese went on to say that, given this, *Cooper v. Aaron* "was, and is, at war with the Constitution, at war with the basic principles of democratic government, and at war with the very meaning of the rule of law."[64] The very rhetoric of originalism suggested that the Court had fallen away from the Constitution and that the president was thereby better positioned to speak for the Constitution than the Court, to return to constitutional first principles. Reagan brought this to light in speeches on federalism, insisting that the states had created

[63] *Cooper v. Aaron* 358 U.S. 1, 18 (1958).

the national government, not the other way around. Reagan even invoked Alexis de Tocqueville in a 1981 television address, suggesting that federalism was key to American democracy.[65] Meese, once again, echoed this thinking by directly taking on the Supreme Court's opinion in *Garcia v. San Antonio Metropolitan Transit Authority*, where the Court, reversing the only significant federalism opinion of the last years, held that Congress could reach state employees by way of its power to regulate interstate commerce. Moreover, the Tenth Amendment was rejected as a limitation on national power and the Court, per Justice Blackmun, went so far as to say that the judiciary was ill-equipped to police the boundaries of state and national power. It was an affirmation of the New Deal Constitution. Meese insisted that in *Garcia* "the Court displayed—in the view of the administration—an inaccurate reading of the text of the Constitution and a disregard for the Framers' intention that state and local governments be a buffer against the centralizing tendencies of the national leviathan." Pushing this further, Meese noted that "the administration's view is that Federalism is one of the most basic principles of our Constitution," and added "we hope for a day when the Court returns to the basic principles of the Constitution as expressed in *Usery*."

In *National League of Cities v. Usery*, a case out of line with the New Deal view of federalism, Rehnquist argued that the Tenth Amendment limited congressional power. The very year that *Garcia* overturned *Usery*, Reagan elevated Rehnquist to the Chief Justiceship. And dissenting in *Garcia*, Rehnquist

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[64] Edwin Meese, "The Law of the Constitution," 987.

turgidly noted that "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."[66] Rehnquist has led just such a resurgence that has its roots in Reagan's constitutional vision. And while Reagan's rhetorical efforts are important, they seem to supplement his more concerted effort through administrative and legal channels. It is in this manner that Reagan brought about his most fruitful constitutional change.

Whither the Current Regime?

We might see the Rehnquist Court as part of Reagan's national governing coalition. Federalism emerged as a political and constitutional issue on the national agenda, addressed by both the political parties, long before the Rehnquist Court's revival of it. It is not clear "that the Court has led a 'federalism revolution,'" so much as "followed national political trends."[67] Submerged in the Reagan years, however, was the possibility of an active Court. A return of the Court's policing state-federal boundaries would almost surely require judicial activism if the national government did not restrain itself and recognize a wide arena for state autonomy.[68] In the last decade the Court has taken on this role, striking down an unprecedented number of congressional acts in the arena of

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[65] Congressional Quarterly, 3 October 1981, 1922.

[66] *Garcia v. San Antonio Metropolitan Transit Authority* 469 U.S. 528, 580 (1986), (J. Rehnquist dissenting).

[67] J. Mitchell Pickerill and Cornell Clayton, "Politics and the Safeguards of Federalism During the Rehnquist Court." Pickerill and Clayton examine the party platforms of both parties noting federalism issues. This is especially true of the Republican Party platforms, which speak "a decentralization of the federal government and efforts to return decision making power to state and local elected officials."

federalism. Critics have been quick to point to the Court's judicial activism, of which Reagan was so critical.[69] So is the Court thwarting congressional will? This question should draw our eye to a central point: the foundations of judicial power are political. While the Court has taken up the role of enforcer of federalism in the constitutional order—with rather dramatic claims to judicial supremacy—this was brought about, after a lag, by Reagan and has strong political support (even if we do not think of it as a coherent regime). Much like the New Dealers before them, those who criticized judicial power in the 1980s have grown comfortable with it in the 1990s, while past supporters have suddenly started invoking notions of judicial restraint and accusing the Court of second guessing the political branches. It is, no doubt, ironic that the President who brought forth the current Court was an advocate of departmentalism, while the Court itself has rejected anything short of judicial supremacy. Still, how solid the current foundation is, including the Court's claims to judicial supremacy, remains to be seen. The fact that so many of these decisions are 5-4 symbolizes the tensions within our constitutionalism and the difficulty, once more, of speaking of constitutional regimes.

Constitutional change rarely emerges all at once as in Ackerman's great constitutional moments; nor does it unfold in a neat evolutionary manner with

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[68] On this aspect of conservative jurisprudence see Thomas Keck, "Activism and Restraint on the Rehnquist Court: Timing, Sequence, and Conjuncture in Constitutional Development" *Polity* Vol. XXXV, No. 1 (2002).

[69] Writing in *The New Republic* ("Our Discriminating Court: Federal Offensive" April 9, 2001), Jeffrey Rosen insisted that the Court's federalism opinions put the "New Deal legacy of a powerful federal government" at stake. Rosen has gone on to suggest that "the resurrection of a tradition of liberal judicial restraint . . . seems more relevant today than at any time since the New Deal." "Breyer Restraint: A Modest Proposal" *The New Republic*, January 14, 2002. Linda Greenhouse "The High Court's Target: Congress" *The New York Times* February 25, 2001.

subtle changes in judicial doctrine. The recognition that presidents—especially great presidents—may remake the constitutional order, and often against the Court, is an important one. Even so, this recognition mirrors some of the problems with conventional notions of judicial supremacy. Indeed, to some degree presidential reconstructions supplement judicial supremacy. In remaking the constitutional order, great presidents engage in departmentalist constitutional rhetoric, displace the current constitutional understandings as articulated by the Supreme Court, and restructure our constitutional views and institutions. The Court, by and large, then returns to its role as the articulator of the new constitutional order.[70] So judicial supremacy is the norm, with moments of constitutional politics as extraordinary events. While surely a more accurate rendering of our constitutional history than simple judicial supremacy, this narrative also misses moments of constitutional dialogue, conflict, discontinuity, unsettlement, and innovation that bring about significant constitutional change. Indeed, the ebb and flow of constitutional meaning may capture the ordinary functioning of our system far more aptly than grand presidential reconstructions or simple judicial enforcement.[71] Constitutional disjunctions may break with the past order without bringing about full-scale constiutitonal change. While Reagan did not overturn *Roe*, it is difficult to say that *Roe* was part of the existing constitutional order in the first place, or that the question of a constitutional right

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[70] Ackerman, Whittington, Skowronek, and Landy and Milkis all go with this narrative to varying degrees.

[71] Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton: Princeton University Press, 1988). See also *Politics and Constitutionalism: The Louis Fisher Connection* (collected essay in tribute to Fisher).

to abortion has truly been settled.[72] We see this with Reagan's revival of federalism: the Rehnquist Court has broken with the New Deal, but in doing so has continued, rather than settled, a constitutional debate.

Undoing the New Deal

The 5-4 federalism decisions in recent years have often amounted to a debate about the New Deal between the majority and dissenting justices. In *Lopez,* when the Court struck down the Gun-Free School Zone Act of 1990, Justice Souter, writing in dissent, raised the specter that the Court may be returning to a pre-1937 reading of the Commerce Clause. He even accused the majority of "ignoring the painful lesson learned in 1937."[73] And Justice Breyer's dissenting opinion, which was joined by Stevens, Ginsburg, and Souter, insisted that Rehnquist's opinion for the majority "runs contrary to modern Supreme Court cases" with particular emphasis on *Wickard v. Filburn*, which solidified the New Deal understanding of the commerce power. It's appropriate that *Wickard* was written by Justice Robert Jackson, who as Roosevelt's Solicitor General had articulated the New Deal constitutional vision to a usually hostile Court. Now on the bench, Jackson solidified this constitutional vision, symbolized all the more by the fact that there was not a single dissenting opinion. In *Wickard*, the Court upheld a congressional regulation that limited the amount of wheat a farmer could grow for home consumption even though it did not move in interstate commerce.

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[72] Not only is there continued and vehement constitutional debate on the issues, with large sections of the political community refusing to view *Roe* as legitimate, the Court itself continues to dispute the meaning of *Roe*. The is evident *Casey* itself and, most recently, with Justices Kennedy and O'Connor disputing the meaning of *Casey* in relation to *Roe* in *Stenberg v. Carhart*, 530 U.S. 914 (2000).

[73] *Lopez* at 609 (J. Souter dissenting).

In doing so, the Court held that it must look at the totality of effects, so even purely local matters might, taken cumulatively, have an effect on interstate commerce. Therefore, such local activities were within the reach of the Commerce Power. Rehnquist's opinion slyly evades the logic of *Wickard*, noting that at least it purported to regulate *commercial activity* while *Lopez* was not regulating commercial activity at all. But as Justice Breyer pointed out: "the Wickard Court expressly held that Wickard's consumption of home grown wheat, '*though it may not be regarded as commerce*,' could nevertheless be regulated—'whatever its nature'—so long as 'it exerts a substantial effect on interstate commerce.'"[74]

Lopez does not sit easily with *Wickard* and looks like a departure. That is surely why Rehnquist, although speaking of *Wickard*, rested *Lopez* on the logic of an earlier New Deal case: *Jones & Laughlin Steel*. This watershed case upheld the National Labor Relations Act (the Wagner Act) against a Commerce Clause challenge, thus allowing a key piece of New Deal legislation to go forward, even while reminding the Congress that

> the scope of this power [the interstate commerce power] must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.[75]

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[74] *Lopez* at 628 (J. Breyer dissenting, italics in original).

[75] *Jones and Laughlin* at 37.

This is just what *Wickard* did four years later. In returning to the logic of *Jones and Laughlin Steel*, the Rehnquist Court may not have been returning fully to pre-1937 understandings of the Commerce Power, but it was just as surely rejecting the full fruit of the New Deal as put forward in *Wickard*.[76]

The Court had opened up another such departure in *New York v. The United States*, where it held that the Congress may not "commandeer" the states by forcing them to take action to implement a federal program. For our purposes, *New York* is significant in that its reading of the Tenth Amendment revived the notion of "dual sovereignty" all but buried in the Constitutional Revolution of 1937. O'Connor explained that

> The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in any given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.[77]

Much like the Chief Justice would later do in *Lopez*, O'Connor held that this was consistent with New Deal precedent, quoting Stone's opinion in *United States v. Darby*: "The Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'"[78] O'Connor uses this truism, though, to breathe life into the Tenth Amendment as a substantive limit on congressional power by restoring

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[76] Justice Thomas concurring opinion helps draw this out, as he urges a complete repudiation of the New Deal cases and a return to pre 1937 understanding of the Commerce Power. *Lopez* at 585 (J. Thomas concurring).

[77] *New York* at 156-157.

the notion of dual sovereignty. This is exactly what Stone was rejecting: *Darby* was meant to bury the notion that dual sovereignty placed any substantive limits on congressional power and place such a reading of the Tenth Amendment in the dustbin of history. Again, while not necessarily returning to a pre-New Deal jurisprudence, the five Reagan/Bush appointees were signaling a significant departure from the New Deal Constitution—and on the very issues it had in fact settled.[79]

The Court's break became evident in *United States v. Morrison* when it struck down the Violence Against Women Act even though Congress had offered substantial findings "that gender-motivated violence affects interstate commerce." This was something Congress had not done in *Lopez*. The Court made apparent the meaning of *Lopez* when Rehnquist insisted that "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question."[80] In its Commerce Clause opinions since *Wickard,* the Court had always insisted that there was—theoretically—a limit on what Congress could regulate under the guise of its commerce power, but the reasoning of the Court's opinions had suggested that Congress' power was plenary. By itself *Lopez* might

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[78] *Darby* at 124.

[79] In *New York v. United States*, Justice Souter supplied the fifth vote and Clarence Thomas was not yet on the Court. In subsequent opinions, Souter would change his vote and become a leading critic of the Court's federalism decisions, while Thomas supplied the fifth vote. The sovereign immunity cases are perhaps the Court's most novel departure, but I don't take them up as they are less central to the New Deal Constitution and Reagan's attempted reconstruction.

[80] *Morrison* at 614. Ronald Rotunda, "The Commerce Clause, the Political Questions Doctrine, and Morrison" *Constitutional Commentary* 18:303 (2001), argues that, in fact, the dissenting opinions in these cases represent the significant departure from past cases insofar as they argue for a complete judicial abdication in this area.

have been a simple recognition of this outer limit. But *Morrison* made clear that the Court would police the "distinction between what is truly national and what is truly local." This gave federalism a bite that while possible in the Court's earlier opinions, was simply not there in practice, a point Rehnquist made explicit:

> Although JUSTICE BREYER argues that acceptance of the government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. JUSTICE BREYER posits that there might be some limitations on Congress' commerce power . . . [but] these suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance.[81]

The so-called federalist five made clear that they would give substance to these limitations on congressional power and, even if *sub silentio*, broke from the New Deal.[82]

Morrison solidified the Court's federalism on another front as well. In addition to the Commerce Clause analysis, Rehnquist's opinion rejected the idea that Congress may federalize traditional state matters, such as violence against women, under Section 5 of the Fourteenth Amendment. Federalism was held to limit Congress' power to enforce the terms of the Fourteenth Amendment. Here federalism bled into the Court's stunning insistence upon judicial supremacy in *City of Boerne v. Flores*, which *Morrison* rested squarely upon. In *Boerne*, Justice Kennedy, appointed by a president who insisted that he could interpret the

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[81] *Lopez* at 564-565.

[82] Dean Alfange, Jr., "The Supreme Court and Federalism: Yesterday and Today" and Tinsley E. Yarbrough, *The Rehnquist Court and the Constitution* see the New Deal as restoring John Marshall's view of the Constitution, much like Edward Corwin, *Constitutional Revolution, Ltd.* (Claremont: Claremont Colleges, 1941) and Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* (New York: Viking Press, 1956). While originalists like Bork and Raoul Berger see the New Deal as a departure from Marshall's Constitution on federalism issues.

Constitution independently of what the Court had said, insisted that constitutional interpretation was a job for the Court alone. "Congress," Justice Kennedy lectured, "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment.]'"[83] As I've noted in several chapters, for Justice Kennedy the Constitution is what the Court says it is. Congress, then, can enforce the Court's reading of the Constitution, but not its own. This is surely at odds with Meese, who had a heavy hand in appointing Kennedy, insisting that "once we understand the distinction between constitutional law and the Constitution, once we see that constitutional decisions need not be seen as the last words in constitutional construction . . . we can grasp a correlative point: constitutional interpretation is not the business of the Court alone, but also properly the business of all branches of government." The majority, though, has been quite insistent upon the Court as the definitive interpreter of constitutional meaning. Does this suggest a return to judicial supremacy, solidifying a departmentalist president's constitutional vision?

Congress and Court

Many scholars suggest we seem to have entered a new constitutional regime, but one whose foundation is remarkably tenuous.[84] We might better understand these developments as consistent with ordinary political change—the

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[83] *City of Boerne v. Flores* 521 U.S. 507, 535-536 (1997).

[84] Tushnet suggests this new constitutional regime is not a radical departure, but one where constitutional aspiration remains chastened. *The New Constitutional Order*.

political Constitution at work—which itself is part or our constitutional development. The persistence of the 5-4 decisions on federalism issues highlights this fact. The four dissenting justices make as coherent a bloc as the Reagan/Bush appointees and are convinced that the Court is wrong. As Justice Breyer put it squarely in dissent at the end of the Court's 2002 term, in yet another 5-4 federalism decision: "[the majority opinion] reaffirms the need for continued dissent."[85] Both sides have solid political support within the political system and the path of federalism will depend on far more than the Court. Indeed, while the Supreme Court played a limited role in the last presidential election, when it was discussed federalism was not the key issue.[86] Rather, the Court factored in, yet again, as a way for both sides to flatter supporters and gain their votes by highlighting *Roe v. Wade*. The rhetorical presidency persists. But this may also say something about the Court's conflict with Congress over the last decade.

The Congress appears reluctant to simply accept the Court's recent decisions, but is appears just as reluctant to boldly challenge the Court. After the Court struck down the Gun-Free School Zones Act in *Lopez* and RFRA in *Boerne*, Congress refused to simply let the Court settle the issue. In passing the

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[85] *Federal Maritime Commission v. South Carolina State Ports Authority* (2002). http://supct.law.cornell.edu/supct/html/01-46.ZDI.html. (Justice Breyer dissenting.) Breyer again invoked the New Deal: "An overly restrictive judicial interpretation of the Constitution's structural constraints (unlike its protections of certain basic liberties) will undermine the Constitution's own efforts to achieve its far more basic structural aim, the creation of a representative form of government capable of translating the people's will into effective public action. This understanding, underlying constitutional interpretation since the New Deal, reflects the Constitution's demands for structural flexibility sufficient to adapt substantive laws and institutions to rapidly changing social, economic, and technological conditions."

[86] Other than deciding it in *Bush v. Gore* (2000)! I mean during the election and not in the aftermath. While critics have insisted that *Bush v. Gore* is not consistent with the Court's commitment to federalism, this need not be so. Even these justices argue that national questions rooted in the Constitution will trump state actions. But most importantly, however one comes down on *Bush v. Gore*, the federalism revolution of the Court has continued.

Violence Against Women Act in 1999, the Congress touched on both of these cases. The Act rested upon both Congress' Commerce Power and its power under Section 5 of the Fourteenth Amendment. In *Lopez*, the Court had rejected the federal regulation of guns in a school zone as far too tenuously linked to the regulation of interstate commerce. So in passing the VAWA, Congress compiled a "mountain of data" to show "the effects of violence against women on interstate commerce." Here, Congress was engaging the Court and attempting to work within the contours of its opinion. The Court, as we have seen, rejected Congress' attempt to do this and signaled how serious it was about the limits of Congress' Commerce Power. Whether Congress will accept this remains to be seen. In the same act, though, Congress did challenge the Court's recent opinion in *Boerne*. By also resting the VAWA on its Section 5 power, Congress was attempting to define substantive rights under the amendment, which the Court, in *Boerne*, insisted Congress could not do. But even here Congress attempted to engage the Court: it tried to show that these rights were not being preserved in the states, which therefore justified congressional action (something it did not clearly show in the RFRA).

Congress itself has been ambivalent about the Court's power, and has even tacitly indulged it. In passing legislation that is constitutionally controversial, Congress often defers to the Court's ultimate judgment by enacting "fast-track" provisions that allow for direct appeal to the Supreme Court so that it may settle the constitutional question. Its reluctance to work out controversial constitutional questions by deferring to the Court for political cover neglects its role as an

independent interpreter of the Constitution. Perhaps most importantly, much of the legislation the Rehnquist Court has struck down is "symbolic" or "message politics."[87] This is particularly evident in the Gun-Free School Zones Act. Here Congress was responding to a perceived national problem to get credit for "doing something." In passing such legislation—which in many cases simply mirrors state legislation—Congress gets political credit. When the Court strikes down such legislation, Congress is not held accountable for the failure; indeed, members of Congress have already received the biggest benefit: recognition from interest groups and their constituents for addressing the issue. Nor, though, are members of Congress necessarily troubled by the Court's decisions, as such decisions don't truly keep congressional members from responding to constituent demands. In fact, many members of Congress may well support the Court's general turn to federalism even while supporting legislation they think the Court very likely to strike down, so as to reap the benefits for responding to interest groups and constituents. This is perhaps why the Court has drawn far more fire from interest groups and Court watchers than from members of Congress. And this says something important about the actions of the Rehnquist Court.

The Rehnquist Court, in contrast to the New Deal Court, has not yet prevented political actors from achieving significant political goals. The Court is not consistently thwarting a powerful national agenda supported by Congress (or the public and the President). Particular political groups may be miffed at the Court, and thus Congress may be reluctant to simply accept the Court's path, but

[87] Devins, "Congress as Culprit" and Whittington, ""Taking What They Give Us."

neither has it mounted a serious challenge to the Court's authority. (And many members are quite content with the Court.) Congress, much like the President with signing statements, engages in a sort of independent constitutional interpretation on the cheap. It asserts this power on occasion, and refuses to simply follow Court opinions (often flatly ignoring them), but it does not flatly reject the Court's claims to judicial supremacy. But this also indicates a sort of judicial supremacy on the cheap. While the Court has insisted upon its unique role in settling constitutional questions, the foundations of such a role are not necessarily solid. We may indulge the Court, so long as it is generally in line with a political consensus, or not directly thwarting the President and Congress' political will. How long this will hold may depend on how far the Court pushes, but it will almost certainly depend upon external political developments. As the four dissenting justices have continually warned, the "consequences of the court's approach [may] prove anodyne."[88] But, depending upon events, the Court's approach may also prove destructive. Justice Souter, the lone outlier of the Reagan/Bush appointees on federalism issues, reiterated this warning in his dissenting opinion in *Morrison*:

> All of this convinces me that today's ebb of the commerce power rests on error, and at the same time leads me to doubt that the majority's view will prove to be enduring law. There is yet one more reason for doubt. Although we sense the presence of [pre-New Deal decisions] once again, the majority embraces them only at arm's-length . . . Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived. The Court's thinking betokens less clearly a return to . . .

[88] *Federal Maritime Commission v. South Carolina State Ports Authority* (2002). http://supct.law.cornell.edu/supct/html/01-46.ZDI.html. (J. Breyer dissenting.)

> conceptual straightjackets . . . than to something . . . unsteady, a period in which the failure to provide a workable definition left this Court to review each case ad hoc. As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional capacity to maintain such a regime for very long.[89]

The dissenting justices persist in insisting the Court's federalism jurisprudence is not tenable and that it may, once again, have to relearn the lessons of 1937. Yet, depending on the trajectory of current politics, the Rehnquist Court's federalism may prove a constitutional moment that leaves the lessons of 1937 as a remnant of the New Deal. The outcome will depend on the constitutional politics of the next few years. We are, in the meantime, in a state of constitutional drift, but such a state is far more familiar in American constitutional history then we often suppose; it is not a stretch to suggest this is politics as usual.

Conclusion

Reagan's counterrevolution against the New Deal—playing FDR in reverse—did not bring on the kind of sweeping constitutional and political change that Roosevelt himself did. Partly this is a result of circumstance. The gradual disintegration of the New Deal coalition in the 1970's was very different from the sharp political crisis of the early 1930's. In fact, Reagan's movement from enthusiastic New Dealer to outspoken critic of the New Deal state over the course of four decades mirrored many Americans' growing frustrations with national centralization. Reagan sought to dismantle New Deal institutions by turning away from Washington D.C. and returning political responsibility back to local and

[89] *Morrison* at 654-655 (J. Souter dissenting).

state governments. Most importantly, he saw this as not just smart politics, but as constitutionally mandated. The Reagan Revolution has succeeded in this far more modest task: it has brought federalism back to the table as a constitutionally robust principle. But this is a work in progress—with the distinct possibility of failure.

In this way, Reagan's constitutional reconstruction reflects the ebb and flow of constitutional change, rather than the dramatic politics of constitutional transformation. Here we see Reagan's break with the New Deal as well as his indirect affirmation of its legacy. The Rehnquist Court's federalism opinions have broken with the New Deal Constitution on the enumerated powers of the national government and the meaning of the Tenth Amendment. Yet, the fact that the most significant aspects of Reagan's constitutional reconstruction worked through the legalistic and administrative realm attests to the continuing presence of New Deal institutions—and reveals, in fact, the institutional and constitutional overlap of different "orders."[90] The Reagan Court, as we might properly call the Rehnquist Court when it comes to federalism, has taken up the role of policer of the federal system and, in doing so, has unsettled the New Deal Constitution. Leuchtenburg concluded "The Constitutional Revolution of 1937" by noting that "'When the extreme negativist position of 1935-36 was forsaken, as it had to be, the Court could find no stopping place short of abdication.' In 1937 the Supreme Court began a revolution in jurisprudence that ended, it appeared forever, the reign of

[90] Karren Orren and Stephen Skowronek, "Beyond the Iconography of Order: Notes for a 'New Institutionalism'" in Lawrence C. Dodd and Calvin Jillson, eds., *The Dynamics of American Politics: Approaches and Interpretations* (Boulder: Westview Press, 1994).

laissez-faire and legitimated the arrival of the Leviathan State."[91] In American constitutional development things rarely last forever.[92] A return to laissez-faire seems unlikely (particularly as it never existed), but the Rehnquist Court is once again attempting to draw a line between national and state authority and, thereby, rejecting the Leviathan state. The fragility of this constitutional shift is highlighted by the fact that it seems to turn on the vote of a single Supreme Court justice. Although the Court is in the forefront of this constitutional development, this should not blind us to the politics that underlie the Court. For far more than a single Supreme Court justice, the fate of the current federalism revival will depend on the course of American politics more generally.

[91] Leuchtenburg, *The Supreme Court Reborn*, 236.

[92] And Leuchtenburg himself is too sanguine about the Court's view of its role in the wake of this constitutional transformation, suggesting the Warren Court comes easily out of the New Deal Revolution in "The Birth of America's Second Bill of Rights" in *The Supreme Court Reborn*, 237-258.

CONCLUSION:

THE POLITICAL CONSTITUTION AND THE MYTH OF JUDICIAL SUPREMACY

Alexis de Tocqueville's *Democracy in America* remains the preeminent work on its subject and scholars of all stripes draw on it to illuminate the workings of American democracy. So much so, in fact, that public law scholars have nearly reduced one of Tocqueville's great observations—"that nearly all political questions in the United States ultimately find expression as legal questions"—to a staid recitation. This is all the more remarkable because this oft quoted expression is treated as a truism; yet it has only tenuous historical support. Though Tocqueville's own understanding of the judiciary's peculiar role in American democracy is illuminating, history has not always borne out his judgments. In speaking of maintaining our Constitution, for example, he insists that:

> In the hands of seven federal judges rests ceaselessly the peace, the prosperity, the very existence of the Union. Without them, the Constitution is a dead letter; to them, the executive power appeals to resist the encroachments of the legislative body; the legislature, to defend itself against the undertakings of the executive power; Union, to have itself obeyed by the states; the states, to repel the exaggerated pretensions of the Union; the public interest against private interest; the spirit of conservation against democratic instability. Their power is immense; but it is a power of opinion. They are omnipotent as long as the people consent to obey the law; they can do nothing when they scorn it.[1]

As I have labored to show in this dissertation, this understanding of the Court as the lone protector of constitutional government has little historical

[1] Alexis de Tocqueville, *Democracy in America*, translated by Harvey Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000) 142.

grounding. Tocqueville's own analysis compounds this problem, insisting that when the Court refuses to enforce an "unconstitutional" law, "one of two things happen: the people change their constitution or the legislature rescinds the law."[2] This, too, has precious little historical support. Many of the great constitutional changes wrought in the twentieth century have taken place outside the courts and without formal constitutional amendment. In more ordinary terms, as we have seen again and again, the Congress often passes laws that challenge the Court's constitutional opinions, rather than "rescinding the law," and the Court adapts to the political branches reading of the Constitution. Tocqueville does put his finger on the deeper issue at the end of the lengthy quote above, when he says that the Court's power is the "power of opinion." This power is omnipotent when the people obey, but impotent otherwise. On this dynamic rests the political basis of judicial power: the Court is powerful when we go along with it. Yet, the political branches (and the public) are unlikely to be controlled by Court opinions they disagree with: they are fully capable of contesting constitutional meaning and forcing adjustment by the Court. This is not, in itself, reason to despair, for the Court is not the sole protector of the Constitution. Contests over constitutional meaning demonstrate the functioning of the Madisonian Constitution, revealing how maintaining the Constitution is a task for all of the branches of government. Putting it in this light should not only lead us to reevaluate the notion that the Court is the great protector of constitutional government, it should lead us to

[2] Ibid. 96.

reevaluate the so-called countermajoritarian dilemma that is at the heart of so much constitutional theory.

The Political Constitution and the Countermajoritarian Critique

In his most recent book, *How Democratic is the American Constitution?*, Robert Dahl picks up a variant of this theme. It is no surprise, given Dahl's various works on democratic theory, that he finds our Constitution, as measured against democratic ideals, wanting. While Dahl insists that his purpose "is not so much to suggest changes in the existing constitution as to encourage us to change the way we think about it,"[3] his analysis is a stunning and harsh critique of the Constitution, very much in line with Progressive critiques of American constitutionalism throughout the twentieth century. Dahl has long preferred, as political scientists since Woodrow Wilson have, a more parliamentary system of government which is less concerned with structural formality, more amenable to popular will, and so more democratic.[4] Indeed, Dahl's work, like Wilson's before him, reads as an extended argument with Madison and his Constitution, arguing that our system "compared with the political system of the other advanced democratic countries, . . .is among the most opaque, complex, confusing, and difficult to understand." It is, in short, undemocratic—witness the Senate—as it lets institutional structures stand in the way of "national majorities," making the Constitution on outdated and unworkable structure of government.[5] Alas, Dahl, an

[3] Robert Dahl, *How Democratic is the American Constitution?* (New Haven: Yale University Press, 2002).

[4] Although later progressives, unlike their predecessors, want to keep the Bill of Rights' formal limitations and have little complaint as to how such limitations thwart democratic will.

[5] Dahl, *How Democratic is the American Constitution*? See also, Gordon Wood, "Rambunctious American Democracy" *New York Review of Books*, May 9, 2002.

extraordinarily accomplished empirical political scientist, does not take seriously the fact that the Madisonian system seems to have worked reasonably well, providing a structure in which political and constitutional questions are worked out as part of the political process. Looking at the history of constitutional disputes as I have done here, suggests that the Constitution has in fact proven "adaptable" and accommodating in meeting the needs of the current generation. True, the constitutional structure does not allow any one side—or branch of government—to single-handedly insist upon its will, or reading of the Constitution—in an immediate way. On the contrary, the very constitutional framework calls forth serious and contentious debate about fundamental constitutional (and political) issues when there is serious disagreement; when, that is, such issues are contested.[6] One the one hand, this reveals the limitations of Tocqueville's heavily digested notion of the Court's acting against the political branches. On the other, it shows how the political branches (the democratic branches) are central to working out constitutional questions, revealing the constitutional framework to be more democratic than Dahl's analysis suggests.

It is interesting, in this light, that two extraordinarily influential political scientists, whose political theorizing is deeply informed by empirical evidence, manage to view the Constitution—and theorize about it—in ways that have little regard for the historical functioning of our constitutionalism. Tocqueville and Dahl represent the twin polls of constitutional theory that I wish to dissolve by seeing the Constitution in more political terms.

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[6] Which is arguably to foster a more serious form of democracy.

Dahl's own pioneering study of the Court has suggested that no branch of government is long able to resist a national majority, as each branch usually falls into line with the "governing coalition's" politics (constitutional or otherwise).[7] Dahl's real complaint, then, is that our constitutional structure makes the construction of such national majorities difficult and complicated, as its multiple institutional structures are not always easy to negotiate. Here, I suggest, we see the limitations of Dahl's earlier work which views the Court as part of the national governing coalition and serves as the basis for a regimes understanding of constitutional development.

The Madisonian Constitution, as I've argued, provides for continued constitutional dispute. The fact that it has multiple institutional actors, which are not always aligned with one another, not only allows for different institutional orders, but creates a space in which political actors can dispute, raise, or revisit questions of constitutional meaning, precluding an easy constitutional settlement.[8] In this way, the Madisonian Constitution may well leave different constitutional questions at different levels of settlement, depending upon the political circumstances of the time.[9] Constitutional theory and constitutional law, which are often preoccupied by bringing order to the constitutional universe, neglect the fact that the Madisonian Constitution—rather than the legal Constitution—is open

[7] See generally Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker" *Journal of Public Law* (1959) 279-295

[8] Which, again, might suggest a more democratic form of government.

[9] What Stephen Skowronek dubs political time. *The Politics Presidents Make* (Cambridge: Harvard University Press, 1993).

to discontinuity, overlapping views, unsettled constitutional meaning, partially settled constitutional meaning, multiple orders and levels of meaning, disjunctions, dialogues, and continued dispute. In some ways, the persistence quest to treat constitutional questions as amenable to "legal" resolution is puzzling, given our persistent conflicts over "creedal passions," which could only result in a sort of disharmony.[10] Given that the Constitution is both fundamental law and our political framework, as Charles Grove Haines noted long ago, it should not surprise us that it is the source of continued dispute. Indeed, it would be odd if it were otherwise.[11]

Political actors, not surprisingly, refer to and attempt to reframe the Constitution in light of their politics, making choices about conflicting constitutional values and trying to order constitutional priorities based upon a particular politics rather than abstract constitutional theorizing. Even so, the constitutional framework and constitutional ideas shape such actors thinking and structure the arguments they are able to make (which is true of the Court as well). As I have argued throughout the last several chapters, to understand the Constitution we must understand American constitutional development, locating particular constitutional disputes within particular historical circumstances, rather than theorizing generally about judicial supremacy and judicial review, judicial activism and judicial restraint, or the role of the Congress and the president.

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[10] Samuel Huntington, *American Politics: The Promise of Disharmony* (Cambridge: Harvard University Press, 1981).

[11] Charles Grove Haines, *The Supreme Court in American Government and Politics, 1785-1835* New York: Russell and Russell, 1960) 9-49.

Constitutional theory has a tendency to get at these questions in the abstract. From this perspective, the Court is seen as the primary (if not sole) protector of the Constitution: its independence and "learning in the law" foster a concern with constitutional principle and fidelity to constitutional text, which it defends with the giving of principled and reasoned arguments in its opinions. All things considered, as Alexander and Schauer argue, it is institutionally predisposed to maintain the Constitution and settle disputed constitutional questions. Against this, the political branches, Congress in particular, are said to be driven by politics (rather than reason or principle), which leads them to be blithely unconcerned with any sort of fidelity to constitutional text or meaning, if not eager to trample upon it. Thus they are likely to be—even institutionally predisposed to be—unconcerned with constitutional limits and rights.[12] Furthermore, given the its independence and penchant for reasoned opinions, the Court is far more likely than the political branches (yearning to satisfy the current whims of the public) to provide for stable constitutional meaning by adhering to precedent and laying down rule-based decisions that will tell us just what the Constitution means and thereby prevent us from succumbing to constitutional anarchy and incoherence.[13] This litany has become a veritable, if untested, truth. As my historical studies suggest, the evidence does not bear out such claims.

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[12] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996) 344. "[I]ndividual citizens can in fact exercise the moral responsibilities of citizenship better when final decisions involving constitutional values are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not the weight of numbers or the balance of political influence."

[13] Alexander and Schauer, "On Extrajudicial Constitutional Interpretation."

These questions depend on particular historical circumstances and cannot be answered detached from concrete circumstances as so much of constitutional theory attempts to do.[14]

The Court, the Congress, and the president, have all acted differently at different periods in our history. Indeed, these institutions have acted differently within the same time frame or constitutional order on different constitutional issues. We cannot, then, easily assign a particular institutional role to these branches of government insofar as constitutional maintenance is concerned. Scholars viewing the Court as driven by law or politics, as active or restrained, or as the great protector of constitutional limits and rights, neglect the myriad ways in which the Court may be each of these things at different times, or even all of these things within a given time period on different issues. We cannot say, for example, as a general proposition, that the Court is the great protector of constitutional rights. As I argued in Chapter 2, Congress was a far more robust protector of the newly freed slaves constitutional rights and far more wedded to the true meaning of the Civil War Amendments than was the Court. Yet, the Court may have been more in tune with public sentiment in refusing to offer a robust protection for such constitutional rights. Similarly, the current Congress, as I touch on in Chapters 2 and 5, has arguably displayed a more robust reading of constitutional rights in many instances than the Court has: in attempting to protect women from various forms of sexual harassment and insure that religious believers will be granted exceptions to general laws in order to practice their

[14] Alexander Hamilton's *Federalist 78* is the classic example where he calls the Court the "faithful guardian of the Constitution." *The Federalist Papers* (New York: Mentor, 1999) 433, 438.

religious beliefs.[15] But it will not do just to speak of rights even in this manner. Perhaps the Rehnquist Court, in striking down this "rights protecting" legislation, is genuinely concerned with constitutional limitations and views these various acts as congressional attempts to overstep its constitutional bounds. Surely, as we saw in Chapters 3 and 4, the Lochner Court and the early New Deal Court were "rights protecting" in their defense of liberty of contract and deeply concerned with constitutional limitations in actively policing the boundaries of Congress' Commerce Power. While New Deal justices like Stone, Frankfurter, and Black attempted to recast the meaning of constitutional rights and limitations—rejecting the Old Court's understanding—the Rehnquist Court has revisited part of this question and, once more, attempted to police the limits of Congress' Commerce Power.

The deeper point is that these constitutional disputes are about the proper ordering of constitutional rights and limitations. We cannot just say: the Court is more "rights protecting," or that Congress is unconcerned with constitutional limits. The question is how conflicting constitutional values should be ordered, which in part is rooted in historical circumstances and political debate. Thus I have argued that constitutional politics between the branches of government fosters a sort of "living constitutionalism" as constitutional values are argued about and realized through such constitutional conflicts, connecting the Constitution to our politics in a more democratic form than our preoccupation

[15] See Louis Fisher, *Religious Liberty in America: Political Safeguards* (Lawrence: University Press of Kansas, 2002) for a general argument that Congress has been far more protective of religious liberty than has the Court.

with the Court would lead us to believe, but not necessarily resulting in a single, settled, coherent constitutional vision. As Ken Kersch argues,

> The Court, it turns out, is doctrinal and political, an obstacle and a hope, active and restrained, and formalistic and pragmatic. Its jurisprudence is in some areas transformed by critical elections, and in others left relatively unchanged. It embraces new ideological visions, at times as wholes, but at others only in part. It resists change, negotiates change, and initiates change.[16]

The Madisonian Constitution, attuned to this interplay, helps us better understand how American constitutionalism actually functions.

The Political Constitution and the Limits of Constitutional Regimes

While a regime's understanding of American constitutional development focuses on historical context, it neglects the ways in which "development" may be a disorderly and uneven process. By connecting the creation and maintenance of particular constitutional regimes to "critical elections," great constitutional moments, or reconstructive presidents, a regimes analysis misses moments of constitutional discontinuity, drift, and unsettlement. In Chapter 3 we saw how the critical election of 1896 failed to bring order to the constitutional universe. Constitutional meaning on the most important issues of the day was best characterized by an incomplete dialogue between the Court and the political branches, leading to a period of constitutional drift. While in Chapter Four we saw how the critical election of FDR in 1932 and his reconstructive presidency recast constitutional meaning and settled the most contentious issues of the day—the government's power to regulate economic life—this very settlement invited

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[16] Ken Kersch, *Discontinuous Development in American Constitutional Law: Civil Liberties and Civil Rights in the Twentieth Century* (New York: Cambridge University Press, Forthcoming) 37.

continued debate on "civil liberties and rights" that, to this day, remains by and large unsettled. Here, even if the New Deal could be characterized as a new constitutional regime, at the heart of this regime were serious discontinuities that reflect the way in which constitutional coherence and settlement may exist on some issues side by side with conflict and unsettlement on other issues. A point that is vividly brought home in Chapter Five with Reagan's and the Rehnquist Court's rejection of part of the New Deal regime. If Reagan's reconstruction did not amount to a full-scale recreation, to dismiss it as a failed "constitutional moment" misses the way in which it has altered our constitutional understanding in significant ways. The Madisonian Constitution is at home with these incongruities.

Seeing the Constitution in Madisonian terms suggests that there is no particular imperative for "authoritative settlement" as such, let alone authoritative judicial settlement when the political branches contest the Court's interpretation of constitutional meaning. The dynamic of the political Constitution is open to persistent conflict about constitutional meaning and attempts to foreclose such debates by the Court are unlikely to succeed, as the political branches, institutionally positioned as they are, have the capacity to persistently and insistently question the logic of the Court's decision. When the political branches contest judicial interpretations of the Constitution, as Teddy Roosevelt did in antitrust and railroad rate-regulation, or as Franklin Roosevelt did on the reach of the national government's Commerce Power, they often succeed in overturning past judicial decisions without resorting to constitutional amendment. Indeed, let

me reiterate here that the most significant constitutional changes in the twentieth century have certainly come from political changes in constitutional meaning, not by way of formal constitutional amendment (whether against past Supreme Court opinions or not).

Other instances are less clear-cut, such as the Congress's efforts to at least work against the logic of the Rehnquist Court's opinions on both Interstate Commerce and Section 5 of the Fourteenth Amendment. While the Congress has not clearly succeeded in overcoming these recent Supreme Court opinions (and its not clear that its effort is aimed at doing so), it has certainly left these constitutional questions in a state of doubt or, perhaps more favorably, openness. We have seen, in Chapter 5, similar efforts from Reagan. His Rehnquist Court appointees have certainly overturned long standing New Deal precedents—forged in the constitutional politics of that earlier era, when the Court came into line with the political branches understanding of their constitutional power—in the sphere of federalism and interstate commerce. Reagan has been far less successful, as I noted, in overturning the Court's opinion in *Roe v. Wade*. But even here, given the persistent conflict over abortion rights, it would be difficult to call *Roe* "authoritatively settled." Indeed, if there is a consensus of sorts that women ought to have a constitutional right to terminate a pregnancy in the early months, the evidence suggests it is based on a social and political understandings, and not derived from the Court's constitutional reasoning.[17]

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[17] See Jeffrey Rosen, "Worst Choice: Why We'd be Better off Without Roe" *The New Republic* February 24, 2003.

Even when Court opinions have stood, striking down significant acts of Congress, we need to focus our view more carefully. As I argued in Chapter 2, for example, by the time the Court struck down the Civil Rights Act of 1875, it was, by and large, articulating popular understandings: Congress was content to live with the Court's opinion and not contest it. Settlement of crucial constitutional questions is likely to come based on an emerging social consensus. Thus constitutional meaning may be settled and then unsettled, may reach a consensus on some issues but not on others, may be contested in ways that transform our understanding or, over time, dissipate, depending upon the fluid pull of politics. Thus, the language of authoritative judicial settlement is ill suited to our constitutional discourse, as it fails to capture the ordinary functioning of our constitutionalism.

The Myth of Judicial Supremacy

The Court, constituted as it is and situated in this larger context, rarely acts in ways that are consistent with authoritative judicial settlement. For the Court to settle constitutional questions it should offer deeply theorized opinions that clearly articulate a wide constitutional principle; it should, that is, be concerned with articulating general constitutional meaning, acting as the political branches constitutional schoolmarm, rather than simply settling the case before it. Yet Court opinions are not always clearly reasoned statements of constitutional principle that offer the political branches guidance on disputed constitutional questions. Partly this stems from the nature of the Court: asked to decide concrete "cases and controversies," the Court rarely spins out the single correct answer that

guides both itself and the political branches in discerning vexing questions of constitutional meaning. Justice Cardozo noted this in his famous lectures *On the Nature of the Judicial Process*, "Our survey of judicial methods teaches us, I think, the lesson that the whole subject matter of jurisprudence is more plastic, more malleable, the moulds less definitively cast, the bounds of right and wrong less preordained and constant, than most of us, without the aid of some such analysis, have been accustomed to believe."[18]

At times the Court might duck the crucial constitutional issues in an opinion, as it did in the first Enforcement Acts cases. At other times, it might reason very clearly and very broadly about the constitutional question at hand, as it did in *E. C. Knight*. A Justice Scalia might argue that it is the Court's job, as the constitutional rule making body, to reason deeply and widely about constitutional questions, laying down "bright-line" constitutional rules to guide the political branches (as well as itself in the future). Justice O'Connor, on the other hand, may approach constitutional questions on a case-by-case basis, seeking to deliberately level unsettled constitutional issues that the Court need not touch to answer the narrow case before it. It is thus very difficult to assign the Court a particular role. Moreover, the fact that there might be more than one plausible answer to a constitutional question makes it unlikely that the Supreme Court will be able to fashion an authoritative reading of constitutional meaning that applies beyond the specific cases *if* the other branches contest it. In the name of stability and coherence, proponents of judicial supremacy plead for such settlement. (Though

[18] *The Judicial Process* (New Haven: Yale University Press, 1921) 161.

we might wonder how "settled" things are when discernable constitutional lines turn on the reading of a single justice: is the Constitution really what Justice O'Connor says it is?) As I have argued, the Court has not been able to settle such contested questions. Rather, Court opinions themselves seem to invite continued constitutional debate on just what the Court's opinions was, how it applies to the particular matter at hand, and whether the Court, in fact, got the Constitution right.[19]

Seeing this traced out in the historical studies allows us to make an empirical distinction between judicial review and judicial supremacy. The political Constitution makes a conceptual distinction between judicial review and judicial supremacy, but the lingering question was whether this conceptual distinction has any empirical bite. It does. The Court's exercise of judicial review does not close constitutional questions when contested by the political branches. No doubt, the Court does strike down particular acts of Congress or the executive as unconstitutional. Yet, the deeper question is whether the political branches then view themselves as obligated be the Court's reading of the Constitution and not just the particular case at hand. The political branches—sometimes explicitly, at others implicitly—do not just follow Court opinions and have proven successful in overturning or modifying Supreme Court opinions that they think

[19] This has lead Robert Nagel to suggest that social consensus is necessary for durable constitutional meaning and that judicial interpretation may actually be at odds with stable meaning. See his *Constitutional Cultures* (Berkeley: University of California Press, 1989) 22. Louis Michael Seidman also makes an interesting argument for "unsettlement." " "When the Supreme Court uses constitutional rhetoric to shut down an argument by imposing one potential settlement rather than another, it is doing something more than announcing the outcome of a political struggle. It is attempting to constitute the community in a fashion that excludes the losers for reasons that cannot be explained in a fashion comprehensible to them." *Our Unsettled*

constitutionally unsound. FDR proceeded with New Deal legislation that clearly went against the Court's view of the Constitution and ultimately prevailed. Teddy Roosevelt adopted a broader reading of the government's commerce power in the antitrust cases that was at odds with the Court's first wave of opinions on this issue. His reading of the Commerce Clause (at least on antitrust) prevailed as the Court followed suit. Ronald Reagan rejected decades of Court opinions on federalism and the Rehnquist Court has taken up his constitutional vision, abandoning these earlier opinions. Perhaps more importantly, as well as more subtlety, the constitutional framework seems to belie any easy notion of settlement.

The proponents of judicial supremacy envision an independent Court working against the political branches. As I have argued throughout this dissertation, this beginning point fails to capture the fashion in which the Court—and the institutional framework generally—functions. The Court and the political branches are not necessarily at odds with one another. The Congress may, as was particularly evident in Chapter 3, invite the Court to work out constitutional meaning. The result in these cases is best characterized as a dialogue where the Court and the political branches negotiate the contours of constitutional meaning. In these instances judicial review is part of the process—whether located at the beginning or the middle—but it is very rarely the end. In fact, this continual back and forth over constitutional meaning—and one that is distinctly non-evolutionary

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Constitution: A New Defense of Constitutionalism and Judicial Review (New Haven: Yale University Press, 2001) 159.

and non-linear—may best characterize judicial review and the institutional framework.

Capturing this constitutional dynamic also has important consequences for such freighted terms as judicial activism and restraint, which, standing alone, are not very illuminating. The very language of activism and restraint fails to capture some of the most crucial dynamics between the Court and the political branches. In part this stems from the fact that both positions begin from the premise of the legal constitution: judicial activism is seen as necessary because the Court is the primary enforcer of the (legal) Constitution, while this very recognition leads those like Professor Bickel to plead for judicial restraint. What to do, though, when the political branches themselves invite the Court to settle highly charged or complicated constitutional questions?[20] Or when the Court actively strikes down a congressional enactment—as it did in the *Civil Rights Cases* of 1883—that Congress itself has little interest in defending? Such instances, which are hardly rare, are not aptly captured by the idiom of activism and restraint.[21] To make better sense of such terms, we need to see the Court in relation to the other branches of government. Focusing on the Court divorced from an institutional and historical setting leads to debates about the imperatives of restraint or activism that fail to illuminate the way in which the Court actually functions.

Attempting to treat the Constitution—which is essentially a political framework of governance—as ordinary law, proponents of judicial supremacy

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[20] Ran Hirschl, "The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions" *Law and Social Inquiry* 25: 91-137 (2000).

[21] See Mark Graber, "The Nonmajoritarian Difficulty" *Studies in American Political Development* 7 (1993).

treat the Court in a non-historical, theoretical fashion, judging constitutional government against their legalist (and theoretical) vision, rather than letting the specific and historical functioning of our institutions inform them about the nature of our constitutionalism. This leads to an insistence on constitutional settlement and stability that distorts our constitutional history. Moreover, such thinking neglects the fact that unsettlement, or open ended constitutional dispute, is an ordinary feature of our constitutional framework, which has not, in fact, lead to the chaos and instability that proponents of judicial supremacy so fear.

A developmental framework, which situates our institutions in historical terms, better captures this constitutional dynamic, with the caveat that "development" does not suggest a forward looking, evolutionary, or linear view of the Constitution: there is no constitutional telos.[22] On the contrary, incongruities, tensions, and conflicts are a central feature of the political Constitution. We were reminded of this rather vividly in the 2000 presidential election, where our twentieth century view of the electoral process and a "plebiscitary president" clashed with the remnants of out nineteenth century institutions in the form of the Electoral College. Such constitutional clashes are rooted in the politics and political disputes of the day, even as they shape and reshape how we view the Constitution. Thus we should not expect that those constitutional issues important today will always remain important. Rather, they will vary with political circumstances, as different parties alter and shift their constitutional views under different circumstances. Yet, beneath the surface of these clashes is a remarkable

[22] See Kersch, *Discontinuous Development in American Constitutional Law,* for a wonderful take on such facile views of constitutional development.

stability, as the public seems to have bestowed upon the Constitution that "veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not posses the requisite stability," as Madison put it in the 49th Federalist Paper.[23] We do have, in this manner, a sort of constitutional faith, but the faith is in the constitutional framework and principles that allows for a deep clash over the particulars of constitutional meaning in different circumstances, continually revisiting how our constitutional values should be ordered. Here we see continual flux and perpetual contests over constitutional meaning.

Seeing the Constitution in a more political light should not denigrate it or reduce constitutionalism to politics in a crass sense. Rather, recognizing that contests over constitutional meaning are, at root, about deep political choices should restore to politics—in all of its complexity and tension—the dignity it deserves. To see the Constitution in a more political light is to recover a more traditional understanding of constitution; it is to see how our Constitution constitutes our political life. Recovering such a view may even give us a deeper sense of ourselves as a polity, illuminating the ways in which the Constitution shapes our politics and, in turn, is shaped and reshaped by them.

[23] *The Federalist Papers*, 282.

APPENDIX

THE MEANING OF AUTHORITATIVE SETTLEMENT

I want to offer a conceptual definition of "authoritative settlement," as a lack of definitional clarity on "authoritative settlement" has lead to theoretical debates with little empirical grounding. Reading Larry Alexander and Fredrick Schauer, perhaps the leading proponents of authoritative judicial settlement, one is struck by the fact that they argue for authoritative judicial settlement in a way that altogether skirts empirical questions: they insist that extrajudicial constitutional interpretation undermines the Constitution. But they conflate their concepts in such a manner that doesn't allow us to actually get at the meaning of authoritative settlement.[1] Alexander and Schauer leave authoritative settlement undefined, while speaking of "deference" and "nondeference" by the political branches to judicial decisions, which gives us some referents of what authoritative settlement might look like. "Non-deference occurs when a nonjudicial official who disagrees with a judicial decision on a constitutional question does not conform her actions to that decision and perhaps even actively contradicts it." And so we might see authoritative settlement of constitutional questions when the political branches defer to Supreme Court opinions. While the concept is not neatly defined, we might know it when we see it. Concerned with normative questions first, Alexander and Schauer are not preoccupied by empirically analyzing authoritative settlement, so the actual cases it applies to are not always clear

[1] Larry Alexander and Fredrick Schauer, "On Extrajudicial Constitutional Interpretation" *Harvard Law Review* 110, 7(1997).

because the definition itself is taken for granted.[2] Yet the empirical component of their claim cannot be avoided. The attributes of authoritative settlement should be specified more clearly, allowing us to actually get at this concept. Moreover, Alexander and Schauer merge several concepts—blurring their logical relationship—that for analytical reasons would be best separated. They conceptualize the Constitution as necessarily demanding authoritative judicial settlement, which itself requires stability and coherence in constitutional meaning. Yet this is all put forward by definition. Authoritative settlement is collapsed into their notion of an "authoritative constitution," which allows them to posit (not demonstrate) that non-deference to Court opinions by the political branches undermines the Constitution. But because they do not give us a clear definition of what constitutes authoritative settlement of constitutional meaning, it is difficult to evaluate their claims empirically. And even if they are engaged in a normative argument, they cannot simply avoid the empirical dimension of their theorizing, as their normative arguments often rest on empirical presuppositions.[3] As it is, their claims remain rooted in their theory and not in questions of actual constitutional governance. While we might see particular instances of "deference" and "nondeference" to judicial decisions under their terms, we cannot get at the bigger theoretical

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[2] Larry Alexander and Emily Sherwin offer a more robust definition of authoritative settlement, yet they too are primarily concerned with the normative aspects of settlement—insofar as is necessary to "law" as such—and not whether the Supreme Court actually acts in this capacity. *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* (Durham: Duke University Press, 2001) 12-13.

[3] A point Alexander and Schauer concede in a recent piece, but do little to change. "Defending Judicial Supremacy: A Reply" *Constitutional Commentary* 17 (2000). See also, Alexander and Sherwin, *The Rule of Rules*, 45-46.

questions they raise; that is, does nondeference to Supreme Court opinions undermine the Constitution?

Bruce Peabody suggests that the debate is lacking definitional clarity, "giv[ing] insufficient attention to what is being analyzed and proposed (and consequently, what is excluded from consideration)." The result is that theoretical, normative, and empirical issues are not separated and scholars speak past one another. True. But Peabody himself never tells us what he means by authoritative settlement.[4] This is also true of Scott Gant's defense and Keith Whittington's critique of authoritative judicial settlement.[5] Perhaps authoritative settlement is so patently obvious, its general definition so transparent, that we don't need to spend time defining it. This is troublesome, though. A definition of authoritative settlement needs to be posited for a number of reasons.

A lack of conceptual clarity at this narrower level leads to problems at a higher level of conceptual abstraction. When authoritative settlement is simply collapsed into the notion of the Constitution, one (conceptual) view of the Constitution is posited and authoritative settlement is deemed necessary by definition (as we see with Alexander and Schauer). By not separating the distinct concepts of "What is the Constitution?" from "Who may interpret it?" we don't sort out what we are analyzing and never give it solid grounding. So

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[4] "Nonjudicial Constitutional Interpretation, Authoritative Settlement, and New Agenda for Research" *Constitutional Commentary* 16, 63 (1999).

[5] Scott Gant, "Judicial Supremacy and Nonjudicial Interpretation of the Constitution" *Hastings Constitutional Law Quarterly* 24 (1997) and Keith Whittington, "Extrajudicial Constitutional Interpretation: Three Objections and a Response" *North Carolina Law Review* 2002.

we don't clearly get at the important questions we are speaking to: is authoritative settlement of constitutional questions central to our constitution? Does the Supreme Court actually settle such questions for the branches of the national government? At a more specific level, the lack of clarity surrounding authoritative settlement doesn't allow us to address important smaller questions. Does unsettled constitutional meaning really promote constitutional instability? What is behind authoritative settlement? Is there even such a thing? Smaller-order concepts—anarchy, stability, and coherence, for example—rest on the meaning of authoritative settlement. Yet, as Whittington suggests, these concepts too should be distinct from authoritative settlement.[6] While closely related to settlement, it is possible to imagine that unresolved constitutional questions—with hotly contested meaning—do not necessarily lead to political instability or chaos. Indeed, need unsettlement even lead to constitutional incoherence? Just because constitutional meaning is not authoritatively settled does not mean it is incoherent.

I suggest that authoritative settlement by the judiciary occurs when a *contested* constitutional question between the Congress, the president, and the Court is resolved by following the Court's opinion. This means that (1.) The constitutional question must have been contested by one (or both) of the political branches. This is important. If the political branches abide by a Court decision when they didn't contest constitutional meaning, we have only shown that the Court settles constitutional questions "to the extent that

[6] Whittington, "Extrajudicial Constitutional Interpretation."

Congress, the President, and the general public find the decisions convincing, reasonable, and acceptable."[7] We have not shown that the Court authoritatively resolves constitutional questions with which the political branches disagree. (2.) The branches now accept the constitutional question in dispute as clearly settled. (3.) They abide by the settlement even if they disagree with it. And (4.) They view the constitutional question as closed (even for the judiciary). This is, admittedly, a sort of "ideal type," but it will allow us to see how close the Court comes (if at all) to actually settling constitutional questions.

[7] Louis Fisher, *Constitutional Dialogues* (Princeton: Princeton University Press, 1988) 244.

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